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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MOBILE TELECOMMUNICATION TECHNOLOGIES CORP.;
DESTINEER CORPORATION,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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Dated: June 20, 1996

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QUESTION PRESENTED

Did the Federal Communications Commission ("FCC" or "Commission") exceed its statutory authority by charging Mtel $33.3 million based on the agency's supposed inherent authority under 47 U.S.C. § 154(i) (1994), even though no part of the Communications Act authorizes such a charge, the Act expressly delineates the narrow circumstances under which the Commission can require payments from licensees, and no agency has ever invoked its inherent, general authority to impose a massive payment of this kind?

PARTIES TO THE PROCEEDING

The petitioner is Mobile Telecommunication Technologies Corp. ("Mtel"), a publicly traded company engaged in the business of telecommunications; Destineer Corporation, previously known as "Nationwide Wireless Network Corp." is a privately held corporation in the business of communications that is majority owned and controlled by Mtel.

Mtel also has an interest in the following subsidiaries: Mtel Paging, Inc.; SkyTel Corp.; Destineer Corporation; United States Paging Corporation; Mtel Technologies, Inc.; Mtel Maine, Inc.; Mtel International, Inc.; Mtel Latin America, Inc.; Mtel Puerto Rico, Inc.; MobileComm Europe Inc.; Mtel Space Technologies Corporation; Mtel Space Technologies, L.P.; COM/NAV Realty Corp.; Intelligent Investment Partners, Inc.; Mtel American Radiodetermination Corporation; Mtel Cellular, Inc.; Mtel Digital Services, Inc.; Mtel Microwave, Inc.; Mtel Service Corporation; Internet Cafe Inc.; Sky Telecom Services Limited; Mtel China, Inc.; SkyTel (UK) Limited; Mtel (UK) Limited; Mtel do Brasil Participaçôes Ltda.; Mtel Argentina S.A.; Mtel Chile S.A.; Mtel Costa Rica S.A.; Mtel del Ecuador S.A.; Telecomunicaciones SkyTel S.A.; Comunicaciones Racotec; Mtel Colombia S.A.; Radio Aviso S.A.; and Nubal S.A.

The Respondent is the Federal Communications Commission.

Paging Network, Inc. and Cox Enterprises, Inc. intervened in Mtel's case (94-1552) before the United States Court of Appeals for the District of Columbia Circuit. BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corporation, and Mobile Communications Corporation of America (collectively, "BellSouth") were appellants in two consolidated cases (94-1553 and 94-1518) before the United States Court of Appeals for the District of Columbia Circuit. The court of appeals denied BellSouth's petition for review in those cases and those mandates have issued.

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PETITION FOR WRIT OF CERTIORARI

Mtel [1] respectfully petitions this Court for a writ of *certiorari* to review the determination of the United States Court of Appeals for the District of Columbia Circuit that the Commission has the authority under 47 U.S.C. section 154(i) (1994) to require Mtel to pay $33.3 million for a paging license despite the unprecedented nature of the charge and despite the agency's lack of authority to impose such a fee.

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[1] Mobile Telecommunication Technologies Corp. ("Mtel") was the original pioneer's preference applicant in this case. Upon receiving a pioneer's preference, it requested that the license granted pursuant to the preference be issued in the name of Nationwide Wireless Network Corp. ("NWN Corp."). NWN Corp. was, at the time, a wholly owned subsidiary of Mobile Telecommunication Technologies Corp. Since then, NWN Corp. has been renamed "Destineer Corporation."

OPINIONS AND ORDERS BELOW

The court of appeals panel opinion granting in part and denying in part Mtel's petition for review is reported in *Mobile Communications Corp. of Amer. v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996) ("*Mtel*") and is reproduced at Appendix A ("App.") bound with this petition. Chief Judge Harry T. Edwards concurred in the panel's conclusion that the FCC's decision was arbitrary and capricious, but dissented from the majority's determination that the FCC had the authority to impose a $33.3 million charge. The May 8, 1996, order of the court of appeals denying Mtel's petition for rehearing and suggestion for rehearing *en banc* is unreported and is reproduced at App. C. The court of appeals stayed the mandate on May 22, 1996. (App. D) The FCC's July 13, 1994 order under review is published at *Nationwide Wireless Network Corp.*, 9 FCC Rcd 3635 (1994) ("*Licensing Order*"), and reproduced at App. B.

JURISDICTION

The Court of Appeals for the District of Columbia Circuit issued its decision on March 8, 1996. On May 8, 1996, Mtel's petition for rehearing and suggestion for rehearing *en banc* were denied. On May 22, 1996, the court of appeals stayed the mandate for 30 days, until June 21, 1996. This petition is being filed within 90 days of the date the court of appeals denied Mtel's petition for rehearing. The jurisdiction of this Court is proper under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED

This case primarily involves 47 U.S.C. § 154(i) (1994) of the Communications Act of 1934 (hereinafter "section 4(i)"), which provides that:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

The other sections of the Communications Act involved in this case are 47 U.S.C. §§ 158, 159, 309(a), and 309(j) (1994). These statutory provisions are set out in relevant part at App. E.

STATEMENT OF THE CASE

Mtel is a small Jackson, Mississippi company that was awarded a "pioneer's preference" in recognition of a path-breaking innovation in paging technology. Although the "preference entitled Mtel to bypass what had been the traditional mechanism for allocating licenses, through a 'comparative hearing,' after which the successful applicant would receive a license free of charge," *Mtel,* App. 2a, the FCC required Mtel to pay the United States Treasury $33.3 million for its license.

The Communications Act does not expressly authorize the Commission to compel Mtel's payment. Recognizing the FCC's lack of express authority, the agency and the lower court instead invoked the Commission's general authority under section 4(i), its so-called "necessary and proper clause." The unprecedented nature of the lower court's action is highlighted by the fact that, although general grants of authority like section 4(i) are not uncommon, *see, e.g.*, 43 U.S.C. § 1733 (1994) (Bureau of Land Management), 15 U.S.C. § 77s(a) (1994) (Securities and Exchange Commission), 42 U.S.C. § 2201(p) (1994) (Nuclear Regulatory Commission), neither the FCC nor any other federal agency has *ever* charged enormous sums for a license based only on such a grant of authority.

A. The Pioneer's Preference Rules Do Not Contemplate Charging Licensees an Amount in Excess of Nominal, Statutorily Prescribed Fees.

On April 27, 1990, the FCC proposed a "pioneer's preference" policy to reward entrepreneurs who "undertake the effort and risk associated with the development of new services and technologies." *Procedures to Provide*

a Preference to Applicants Proposing an Allocation for New Services, 5 FCC Rcd 2766 (1990). The grantee was to receive a license "without having to face competing applications and, under the assumption prevailing when the preference was awarded, without having to pay." *Mtel*, App. 2a.

The FCC ultimately adopted a pioneer's preference policy that set forth specific, highly restrictive criteria that, if met, would entitle an innovator to a preference in the licensing of the new service. *Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services*, 6 FCC Rcd 3488 (1991). That preference was meant to be dispositive; the rules provided that a pioneer would "not be subject to mutually exclusive applications." *Id.* at 3498 (codified as amended at 47 C.F.R. § 1.402(b) (1994) (App. 101a)). Mutually exclusive applications are those where the applicants' conflicts are such that "the grant of one application would effectively preclude . . . the grant of one or more of the other[]" applications. 47 C.F.R. § 22.131 (1995) ("Mutually Exclusive Applications") (App. 106a).

When the Commission established the preference policy, the only fees it had ever charged were those expressly set forth in the Communications Act (the "Act"). Sections 158 and 159 of the Act, along with the Commission's newly granted auction authority, establish a comprehensive schedule of fees and charges. Section 158's language is mandatory: "Until modified [to reflect changes in the CPI], the Schedule of Application Fees which the Federal Communications Commission *shall* prescribe pursuant to subsection (a) of this section *shall* be as follows." 47 U.S.C. § 158(g) (1994) (App. 77a-78a) (emphasis added); *see also* 47 U.S.C. § 159(g) (1994) (App. 83a-85a) (setting forth schedule of annual fees). Additional charges may be imposed only "as a penalty for late payment of charges." 47 U.S.C. § 158 (c)(1) (1994) (App. 76a). The statutorily prescribed

application fee for Mtel's license was $230, with an additional annual fee of 2 cents for every unit deployed.[2]

B. The FCC Rewarded Mtel for Its Innovative Service by Granting It a Pioneer's Preference Subject Only to Statutory Licensing Fees.

Relying on the FCC's promise that a sufficiently innovative technological advance would be rewarded with a pioneer's preference, Mtel initiated an ambitious research project it called the Nationwide Wireless Network ("NWN") in the spring of 1991. Mtel invested some $50 million in research and development to create a revolutionary two-way messaging service that permits lengthy messages to be sent wirelessly at a rate ten times that of then-existing paging systems. *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 7 FCC Rcd 5676, 5735 (1992).

On July 23, 1993, the FCC "grant[ed] a [final] pioneer's preference to Mtel for a nationwide license." *Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services*, 8 FCC Rcd 7162, 7175 (1993). The agency found that "Mtel's development of [NWN] . . . is a significant communications innovation of the sort the Commission established the pioneer's preference rules to recognize." *Id.* at 7174.

C. Following Congress's Grant of Auction Authority, the FCC Repeatedly Concluded Mtel Should Not Be Required to Pay an Extraordinary Charge.

Months after Mtel's pioneer's preference was finalized, the FCC received long sought-after authority from Congress to auction radio licenses. Omnibus Budget Recon-

[2] After the FCC had adopted its pioneer's preference policy, and after Mtel's preference was finalized, Congress conferred on the Commission the authority to dispose of licenses via auction. *See infra* pp. 5-7. Prior to 1993, however, the FCC did not have the authority to conduct such auctions.

ciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 388 (1993) (codified at 47 U.S.C. § 309(j)(1)) (1994) (App. 86a).[3] For the first time, the Commission was authorized to collect, through "competitive bidding," charges in excess of the statutory application fees. "This right was a major development for an agency that, for almost sixty years, had been confined by statute to charging nominal license fees." *Mtel*, App. 23a (Edwards, C.J., dissenting in part).

The grant of auction authority was not unconstrained, however. Although Congress obviously could not specify the amounts that would be bid for licenses auctioned pursuant to section 309(j), it carefully limited the Commission's authority to use competitive bidding. *See, e.g.*, 47 U.S.C. §§ 309(j)(1), (2), (10), (11) (1994) (App. 86a-87a, 93a-94a). Specifically, Congress restricted the use of competitive bidding to situations where *"mutually exclusive* applications are accepted for filing." 47 U.S.C. § 309(j)(1) (1994) (App. 86a) (emphasis added). Because pioneer's preference licenses are, as noted above, by definition *not* mutually exclusive, this provision necessarily excludes pioneers such as Mtel from the statute's ambit.

Congress also made clear that its grant of auction authority did not "alter" the traditional manner in which the Commission was to allocate spectrum or the other procedures set forth in the rest of the Act. 47 U.S.C. § 309 (j)(6)(A) (1994) (App. 89a-90a); H. Conf. Rep. No. 213, 103d Cong., 1st Sess. 484-85 (1993), *reprinted in*

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[3] The FCC had pursued auction authority at least since the mid-1980s. *See, e.g., Spectrum Auctions: FCC Proposals for the Airwaves, 1996: Hearing on H.R. 170 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986). Although Congress had often contemplated giving the agency such authority, it did not actually confer this authority until 1993. *See also* H.R. 531, 102d Cong., 1st Sess. (1991); H.R. 1407, 102d Cong., 1st Sess. (1991).

1993 U.S.C.C.A.N. 1088, 1173-74. Nor was the conferral of such authority to "be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology." 47 U.S.C. § 309(j)(6)(G) (1994) (App. 90a).[4]

Subsequently, the Commission began a rulemaking proceeding to assess how the pioneer's preference rules should be applied in the new auction era. The FCC noted that "[i]nasmuch as we have determined that a pioneer's preference application will be the sole application acceptable for filing . . . we believe that the statutory language, combined with our pioneer's preference regulatory scheme as it currently exists, *exempts pioneer's preference licensees from payment* for a license so issued." *Review of the Pioneer's Preference Rules,* 8 FCC Rcd 7692, 7693 (1993) (emphasis added). On three occasions over the next six months, the Commission reaffirmed its conclusion that the statutory and regulatory scheme, as well as equitable considerations, required that Mtel not be charged an extraordinary fee. *Id.* at 7694-95; *Review of the Pioneer's Preference Rules,* 9 FCC Rcd 605, 610 n.21 (1994); *Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services,* 9 FCC Rcd 1309, 1316 1994); *see Mtel,* 22a-23a (Edwards, C.J., dissenting in part).

The Commission then invited Mtel to apply for a license. FCC Public Notice, Mimeo # 41645 (rel. Feb. 3, 1994).

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[4] Congress also reiterated the FCC's "obligation in the public interest to continue to use engineering solutions, negotiations, threshold qualifications, and other means in order to avoid mutual exclusivity in application and licensing proceedings." 47 U.S.C. § 309(j)(6)(E) (1994) (App. 90a).

D. Following a Letter and Proposed Legislation from an Influential Congressman, the FCC Abruptly Reversed Course and Imposed an Unprecedented Charge on Mtel.

Expecting its license to be routinely granted in accordance with the Commission's rules, Mtel applied to convert its finalized preference into a license on February 9, 1994. Three months after Mtel applied for its license, the then-Chairman of the Subcommittee on Oversight and Investigations of the United States House of Representatives Committee on Energy and Commerce sent the FCC a letter expressing concerns about the absence of payment obligations on recipients of pioneer's preferences. Letter from the Hon. John D. Dingell to William E. Kennard, General Counsel, Federal Communications Commission (May 3, 1994). On June 30, 1994, Congressman Dingell sponsored H.R. 4700 (which eventually died in committee). *See* CCH Congressional Index, 103d Cong., 2d Sess., 28, 428-28, 429 (1994). Had it passed, H.R. 4700 would have required Mtel and other pioneer's preference holders to pay 90 percent of the highest bid received for a comparable license at auction. H.R. 4700, 103d Cong., 2d Sess. (1994).

Approximately two months after this letter and the introduction of H.R. 4700, the Commission abruptly reversed course on the payment issue. *Licensing Order*, 9 FCC Rcd 3635 (App. B); *Mtel*, App. 24a ("The FCC [then] got weak-kneed and turned tail on Mtel when a member of Congress cried 'wolf'.") (Edwards, C.J., dissenting in part). The agency granted Mtel's license, but conditioned that license on payment "to the United States Treasury [of] an amount equal to ninety (90) percent of the lowest winning bid for a nationwide narrowband [personal communications service ("PCS")] license or three million dollars ($3,000,000) less than the lowest winning bid for a nationwide narrowband PCS license,

whichever is less." *Licensing Order*, App. 66a.[5] Given that the lowest winning bid for a comparable license was $37 million, the FCC order would require Mtel to pay 90 percent of that figure, or $33.3 million.

Because no statutory provision explicitly authorized such an extraordinary payment obligation, the Commission relied on its so-called "necessary and proper" authority in section 4(i). 47 U.S.C. § 154(i) (1994). Although concurring in the result, Commissioner Quello found "problematic" the FCC's "statutory basis for imposing this payment requirement on Mtel." *Licensing Order*, App. 67a. He candidly conceded that: "[The FCC's] legal analysis, although plausible, certainly entails *what may best be described as an aggressive interpretation of Section 4(i)* of the Communications Act." *Id.* (emphasis added).

E. Congress Adopted a Statute Explicitly Granting the Commission Fee Authority to Charge Certain Pioneers, But Not Mtel, Auction-Based Fees.

In response to concerns about the agency's power to require pioneers to pay, in November 1994 Congress enacted legislation explicitly authorizing the FCC to compel payment from certain pioneer's preference licensees. This legislation, which was integrated into the financing package of the Uruguay Round Agreements Act ("GATT"), thus required payments, calculated according to a statutorily prescribed formula, from existing 2 GHz pioneers and from all future pioneers. 47 U.S.C. § 309(j)(13)(B) (1994) (App. 96a).[6]

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[5] Although the FCC's *Licensing Order* acknowledged receiving the letter and described the recently introduced legislation, the Commission denied that it had been influenced by the bill. *Id.* at 48a n.66.

[6] Mtel's "narrowband" PCS service is in the 900 MHz band and is suitable for paging-type services. The FCC also separately awarded pioneer's preferences in the broadband, or 2 GHz, frequency band, which is appropriate for voice transmissions.

The House Ways and Means Committee incorporated language into GATT expressly authorizing such a payment in the fear that "there may be some question about the authority of the Commission to require pioneer preference holders to pay." H.R. Rep. No. 826 (II), 103d Cong., 2d Sess. 7 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4013, 4019. Similarly, the Statement of Administrative Action in the President's Message on GATT asserted that "Section 801 eliminates the uncertainty arising from current legislation by mandating" payments for some licenses. H.R. Doc. No. 316, 103d Cong., 2d Sess. (1994).

Importantly, the GATT legislation does "not apply to applications that have been accepted for filing on or before September 1, 1994." 47 U.S.C. § 309(j)(13)(D)(iv) (1994) (App. 97a). By its own terms, therefore, the GATT legislation did not grant the authority to charge for Mtel's application, which was accepted for filing on February 25, 1994 (FCC Public Notice, Memo #41903 (February 25, 1994)), and finalized in July 1994. *Licensing Order*, App. 29a, 32a.

F. The Court of Appeals Invalidated the Payment Requirement as Arbitrary and Capricious, But Upheld the FCC's Authority to Impose Such a Charge.

Pursuant to 47 U.S.C. § 402(b)(1) (1994), Mtel appealed the FCC's payment condition to the court of appeals. On March 8, 1996, the panel issued an opinion finding that the FCC "failed to engage in reasoned decision-making in deciding to impose the payment requirement." *Mtel*, App. 12a. The majority believed, however, that section 4(i) gave the FCC authority to impose a payment on Mtel.

The majority acknowledged "the specificity of Congress's grants of authority to charge applicants for licenses"—namely, "certain administrative fees in connec-

tion with the licensing process" and monies from "auctions of specified types of licenses where [the Commission] has accepted competing applications." *Mtel*, App. 7a. But it rejected Mtel's argument that "because the statutory scheme 'limits a thing to be done in a particular mode, it includes the negative of any other mode.' " *Id.* (quoting *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929)). The majority characterized this argument as mere "reliance on the expressio unius maxim" which "has little force in the administrative setting where we defer to an agency's interpretation of a statute unless Congress has directly spoken to the precise question at issue." *Id.* (quotation marks and citations omitted).

The majority held that "the nature of Congress's auction authorization more supports than undermines the Commission's" assertion of authority to charge Mtel. *Id.* The court concluded that Congress intended auction-like fees to be applied to "valuable" licenses like that of Mtel. *Id.* Charging Mtel an auction-based payment, the court said, "would enable the Commission to reap many of the benefits of Congress's own new policy." *Id.* at 9a. The majority also found that the Commission's assertion that a payment was in the "public interest" made it not "inconsistent with" the Communications Act, and therefore permitted under section 4(i). *Id.* at 10a. The court remanded the case to the Commission to reconsider "whether Mtel's license should be conditioned on payment in light of its claims of reliance and inconsistent treatment of others." *Id.* at 20a.

Chief Judge Edwards agreed that the Commission had acted arbitrarily and capriciously in imposing the payment. He disagreed, however, that the FCC had the power under section 4(i) to mandate such a charge. "It is undisputed that *the FCC has never before in its history imposed a licensing fee absent explicit authorization*," he noted. *Id.* at 25a (Edwards, C.J., dissenting in part)

(emphasis in original). "*It is also conceded that there is no such authorization in this case.*" *Id.* (emphasis in original). Judge Edwards therefore rejected the FCC's effort "[i]n the absence of statutory authorization for the fee it sought to impose," to "concoct[] an argument to support its action by bridging together its general authority to administer the Communications Act, found in 47 U.S.C. § 154(i) (1994) ('section 4(i)'), and the auction framework that Congress established in 1993 to govern non-pioneer's preference licensees in 47 U.S.C. § 309(j) ('section 309(j)')." *Id.* at 26a.

Judge Edwards continued: "[c]haritably speaking, the [FCC's] argument is something akin to the FCC saying that it has the power to do whatever it pleases merely by virtue of its existence, a suggestion that this court normally would view as incredible." *Id.* (citations and quotation marks omitted). Judge Edwards noted that Congress itself "apparently did not share such an expansive view of the FCC's authority under the existing law, because, in late 1994, it decided to pass a statute specifically authorizing the FCC to collect fees from [other] pioneer's preference license recipients." *Id.*

Explicating the implications of the majority's decision, Chief Judge Edwards concluded:

> Under the FCC's logic, as soon as Congress grants the agency permission to engage in certain conduct, such as charging market-value license fees, on an explicitly-defined basis, section 4(i) automatically confers the right to apply that power across the board. If this reading were correct, it would completely eviscerate the power of Congress to determine the scope of the statutes it passes.

Id. at 27a.

REASONS FOR GRANTING THE WRIT

As Judge Edwards said, at stake in this case is "the power of Congress to determine the scope of the statutes it passes." *Mtel*, App. 27a. Congress's ability to control agencies is particularly important in the present context, where an agency has for the first time asserted the authority to impose a multi-million dollar charge based on a residual grant of general authority shared by many agencies. Although Congress limited the FCC's auction authority to licenses that were mutually exclusive—which necessarily excludes Mtel—the lower court relied on the FCC's public interest authority, an overly expansive view of Congress's intent, and section 4(i) to override that limitation. It is simply too dangerous to let stand a ruling that could allow every agency with a residual grant of authority to claim the untrammelled power to charge monies, or otherwise act as it pleases, unless Congress has specifically prohibited that agency from taking such action.

The FCC's statutory scheme shows that Congress has specifically and narrowly circumscribed the Commission's power to impose fees and conduct auctions. The auction authority is limited to licenses that, unlike Mtel's, are mutually exclusive. The Commission's fee authority sets highly specific charges for licenses that do not contemplate or authorize Mtel's $33 million charge. These constraints, as well as sixty years of agency practice, manifest a strong congressional intention *not* to give the FCC such broad authority. In fact, when Congress sought to have the agency charge other pioneer's preference recipients, it gave the agency the power to do so explicitly. This illustrates Congress's belief that the agency does not hold the power that the lower court has now found the Commission to possess.

This Court's review is therefore warranted to ensure that agencies do not rely on general grants of authority to collect multi-million dollar fees from regulated entities (or take whatever other action they wish) simply because

Congress has not expressly forbidden them from doing so.

I. DUE TO THE SIMILARITY OF MANY ADMINISTRATIVE AGENCIES' STATUTORY SCHEMES, THE LOWER COURT'S DECISION REPRESENTS A SWEEPING EXPANSION OF AGENCY POWER.

The lower court's validation of the FCC's use of its so-called necessary and proper clause, section 4(i), to authorize Mtel's fee would grant sweeping new powers to other administrative agencies that have similar authority. By giving this common provision such a broad interpretation, the lower court has opened the door to a wide array of unauthorized administrative actions. Indeed, the lower court's ruling grants agencies a roving commission to raise funds by administrative fiat simply by invoking their necessary and proper authority.

The abundance of "necessary and proper" clauses in other agencies' organic statutes makes the lower court's decision especially dangerous. Among the agencies possessing such authority are the Securities and Exchange Commission, 15 U.S.C. § 77s(a) (1994); the Bureau of Land Management, 43 U.S.C. § 1740 (1994); the Nuclear Regulatory Commission, 42 U.S.C. § 2201(p) (1994); the Food and Drug Administration, 21 U.S.C. § 363 (1994); the Environmental Protection Agency, 42 U.S.C. § 7601 (1994) (Clean Air Act); the Department of Transportation, 49 U.S.C. § 40113(a) (1994); and the Federal Energy Regulatory Commission, 42 U.S.C. § 7172(a)(2) (1994). Congress granted these agencies so-called "necessary and proper" authority in order to fill in the gaps left in statutory schemes and to prevent agencies from having to obtain congressional approval whenever they seek to "stray[] a little way beyond the apparent boundaries of the Act—to the extent necessary to regulate effectively those matters already within its

borders." *Licensing Order*, App. 55a. Congress did not grant such authority to allow agencies to rewrite statutory constraints on their power, particularly constraints on imposing monetary charges.[7]

The assertion by an agency of "the power to do whatever it pleases merely by virtue of its existence," *Mtel*, App. 26a (Edwards, C.J., dissenting in part), has dramatic implications. For example, the Bureau of Land Management ("BLM"), has a necessary and proper clause not unlike that of the FCC; BLM may "promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands . . ." 43 U.S.C. § 1740 (1994). Like the FCC, BLM may also auction off a public good (land) to advance public interest objectives. 43 U.S.C. §§ 1713, 1734 (1994).

Congress has decreed that BLM must sell agricultural lands in parcels "no larger than necessary to support a family-sized farm." 43 U.S.C. § 1713(e) (1994). But the rationale of the lower court's decision would enable BLM to use its necessary and proper authority to sell larger than family-sized parcels to corporate agricultural purchasers, for example. These corporations would presumably pay a higher price for the land, thereby advancing one of Congress's goals in passing the auction legislation: to raise monies for the Treasury. Under the lower court's logic, barring such a sale would prevent BLM from "reap[ing] many of the benefits of Congress's own

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[7] Previous judicial decisions support this interpretation of section 4(i). *See Telecommunications Research and Action Center v. FCC*, 836 F.2d 1349 (D.C. Cir. 1988) (rejecting reliance on section 4(i) to justify lotteries absent preferences for media diversification); *New England Telephone v. FCC*, 826 F.2d 1101, 1107-08 (D.C. Cir. 1987) (permitting the FCC to employ a remedy under section 4(i) because it was "absolutely necessary" to achieve a congressionally mandated goal), *cert. denied*, 490 U.S. 1039 (1989); *Turner v. FCC*, 514 F.2d 1354, 1355 (D.C. Cir. 1975) (agency lacked authority under section 4(i) to assess attorney fees).

new policy—including obtaining reimbursement for the transfer of a valuable entitlement." *Mtel*, App. 9a (rejecting Mtel's assertion that Congress excluded Mtel from the FCC's auction authority).

Plainly, such a sale should not be permitted even if it were to comport with one of Congress's objectives in passing auction legislation—raising funds—because it violates a limitation on BLM's auction authority—*i.e.*, requiring family-sized farm parcels. Similarly, subjecting a non-mutually exclusive applicant to an auction-based fee based on Congress's general intention to raise revenues is inconsistent with the limitations on the FCC's authority.

The lower court also utilizes the general public interest provision in the Communications Act to undercut the explicit statutory language. *See Mtel*, App. 10a. Here, too, the prevalence of general public interest mandates opens the door for other agencies to expand their authority. For example, in addition to having section 4(i)-type authority, *see* 15 U.S.C. § 77s(a) (1994), the SEC also has the power to exempt certain securities from registration and the corresponding fees, if registration is "not necessary in the public interest and for the protection of investors." 15 U.S.C. § 77c(b) (1994). Congress has limited this exemption authority to securities whose aggregate amount is less than $5 million. *Id.* Under the lower court's rationale, the SEC could invoke its necessary and proper authority, together with its general public interest mandate, to exempt certain securities that are valued at more than $5 million. Such an assertion of power is, again, no different than subjecting non-mutually exclusive licenses to auction-based fees based on the public interest.

Other agencies could also assert enhanced authority under the lower court's sweeping interpretation of the FCC's necessary and proper clause. Thus,

- Based on the Nuclear Regulatory Commission's general mandate to regulate "to protect [the] health" of the public, 42 U.S.C. § 2201(b) (1994), the NRC could use its necessary and proper authority and general public safety mandate to place license charges on research reactors, despite a statutory fee exemption for reactors "used primarily for educational training and academic research purposes." 42 U.S.C. § 2214 (c)(4) (1994).

- Using "necessary and proper" authority, and despite the mandate that the Secretary of Transportation may not collect fees other than those that were in effect on January 1, 1973, 49 U.S.C. § 45301(a) (1994), the Secretary could impose new fees or charge a completely new class of aviation authorizations. The Secretary could contend that new fees are "necessary to carry out" air commerce and safety programs, 49 U.S.C. § 40113(a) (1994), and are required to meet the Department's "public interest" obligations. 49 U.S.C. § 40101(a) (1994).

- The EPA could use its "necessary and proper" authority, 42 U.S.C. § 7601(a) (1994), to change the way it administers acid rain "pollution allowances" under the Clean Air Act. Under the lower court's reasoning, despite specific directions from Congress on auction procedures and applicability, 42 U.S.C. § 7651o (1994), the EPA might require that allowances be bought in minimum blocks, or give bidding credits to certain parties, if the Administrator were to find that such regulations are "necessary to carry out his functions" under the Act.[8]

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[8] As noted above, Congress drew a line in the GATT legislation that the pioneer's preference fees do "not apply to applications that have been accepted for filing on or before September 1, 1994." 47 U.S.C. § 309(j)(13)(D)(iv) (1994) (App. 97a). The FCC nonetheless determined that Mtel should be charged an auction-

The similarity of many regulatory regimes to that of the FCC, most notably the widespread existence of necessary and proper clauses, makes the lower court's decision a dangerous precedent. There are sound reasons for the statutory maxims that the specific controls the general, *see, e.g., Holder v. Hall*, 114 S. Ct. 2581, 2604 (1994) (*citing Cleveland v. United States*, 329 U.S. 14, 18 (1946)), and that the specific grant of a particular power implies the negative of another, closely related power. *See, e.g., Leatherman v. Tarrant Cty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993). Agencies cannot be permitted to assert the power to do anything that Congress has not explicitly prohibited them from doing. The lower court's decision warrants review and reversal.

II. THE MAJORITY'S UNPRECEDENTED DECISION THAT AN AGENCY HAS THE AUTHORITY TO TAKE ANY ACTION NOT EXPRESSLY PROHIBITED CONTRAVENES THE STATUTORY SCHEME AND IS CONTRARY TO FUNDAMENTAL PRINCIPLES OF ADMINISTRATIVE LAW.

In addition to being unprecedented, the charge to Mtel for its license is also unauthorized. Moreover, it is "inconsistent with" the carefully circumscribed power that Congress has given the Commission to collect monies via fees and auctions. 47 U.S.C. § 154(i) (1994). As such, it contravenes the principle that agencies are limited to the powers Congress granted them. Where Congress has

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based fee even though Mtel filed its application in February, well before the September cut-off date. Congress has often drawn temporal lines on fee-charging authority. *See, e.g.*, 42 U.S.C. § 7178 (a)(1) (1994) (granting FERC fee authority beginning in fiscal year 1987); 21 U.S.C. § 379h(a)(1)(A) (1994) (granting FDA fee authority after September 1, 1992). The lower court's decision thus suggests that an agency need not adhere to these temporal restrictions on their fee authority where the agency finds that the public interest warrants continued (or earlier) imposition of the once authorized charges.

narrowly limited the power of an agency to take a particular action under certain defined circumstances only, the agency may not rely on its residual grant of authority to act in dramatically different circumstances of its own choosing.

A. Agencies May Not Impose Multi-Million Dollar Payment Requirements Without Express Authorization From Congress.

The lower court's opinion fails to recognize the limited and narrowly defined role that Congress has granted administrative agencies in levying fees and charges. The Constitution permits only one branch of government to impose taxes and otherwise raise revenue, and through one procedure only: "All Bills for raising Revenue shall originate in the House of Representatives." U.S. Const., art. I. sec. 7. *See, e.g., United States v. Munoz-Flores*, 495 U.S. 385, 396 (1990) (discussing importance of provision). For this reason, Congress has carefully spelled out the circumstances under which agencies can exact payments from those they regulate. *See, e.g.*, 15 U.S.C. § 77f(b) (1994) (SEC); 42 U.S.C. § 4370c (1994) (EPA); 21 U.S.C. § 379h(b) (1994) (FDA).

Absent a clear statement, courts will not presume that Congress has authorized a federal agency to levy charges on regulated entities in excess of the administrative costs associated with that agency's functions. Thus, in *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 342 (1974), this Court held that the relevant statute must be construed "narrowly to avoid constitutional problems" that would arise from an open-ended delegation to the FCC of authority to impose charges higher than mere "fees" for services rendered by the agency. *See also National Cable Television Ass'n, Inc. v. FCC*, 554 F.2d 1094, 1106 (D.C. Cir. 1976) ("fees" are based on "a reasonable approximation of the attributable costs which the Commission identifies as being expended to benefit the recipient").

Nor does Section 4(i) set forth "standards guiding [the agency's] actions such that a court could ascertain whether the will of Congress has been obeyed" in levying a charge on Mtel. *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989) (quotation marks omitted). As such, "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Industrial Union Dep't. v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980). Yet the lower court construed the statute in precisely such an impermissibly "open-ended" way.

Here, as Chief Judge Edwards explained, "[i]t is undisputed that *the FCC has never before in its history imposed a licensing fee absent explicit authorization from Congress. It is also conceded that there is no such authorization in this case.*" *Mtel*, App. 25a (Edwards, C.J., dissenting in part) (emphasis in original). Given the absence of authorization to impose this multi-million dollar fee, such a charge must be considered beyond the agency's power.

B. The FCC's Assertion of Power Is "Inconsistent With" the Communications Act and Congress's Traditional Role in Limiting Agency Authority to Levy Fees.

Not only was the multi-million dollar charge to Mtel unauthorized, it was also "inconsistent with" the fee collection and auction provisions of the Act in violation of section 4(i). 47 U.S.C. § 154(i) (1994). These two congressional grants—license fees and the monies from competitive bidding—are the only types of assessments the Commission is authorized to collect in connection with telecommunications licenses. *See* 47 U.S.C. §§ 158, 159 (1994) (App. 75a-85a). This statutory backdrop suggests that the payment requirement is "inconsistent with" the Communications Act.

What is more, when Congress wanted to authorize the agency to require payments from pioneers, it did so ex-

pressly, in the form of Title VIII to the GATT legislation. Title VIII permitted the FCC to charge pioneer's preference recipients who filed their applications *after* September 1, 1994. Congress thus excluded Mtel's license application, which was filed almost eight months before. As Chief Judge Edwards observed, had Congress shared the majority's expansive view of the FCC's authority under the existing law, it presumably would not have deemed it necessary "to pass a statute specifically authorizing the FCC to collect fees from [other] pioneer's preference license recipients." *Mtel*, App. 26a.

" 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' " *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979) (quoting *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929)). Contrary to the lower court's decision, this rule applies with special force in the administrative context, for administrative agencies possess only the power Congress has delegated to them. *See, e.g., Stark v. Wickard*, 321 U.S. 288, 309 (1944) ("When Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted."); *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) ("the extent of [an agency's] powers can be decided only by considering the powers Congress specifically granted it;" "the *duty* to act under certain carefully defined circumstances simply does not subsume the *discretion* to act under other, wholly different, circumstances"), *cert. denied*, 115 S. Ct. 1392 (1995). An agency thus does not possess "*plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area." 29 F.3d at 670. In short, an agency may not unilaterally ignore conditions that Congress has placed on a particular action. *See, e.g., Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("[A]n agency's power is no greater than that delegated to it by Congress.").

The lower court's assertion that charging Mtel is "consistent" with the Communications Act because the Commission found the fee in the "public interest" as required under section 309 ignores the rest of the statute. 47 U.S.C. § 309 (1994) (App. 86a) While Congress has mandated that the FCC grant or deny licenses based in part on the public interest, convenience and necessity, this statutory charge does not negate the rest of the statute. The public interest language cannot trump sixty years of congressional limitations on the Commission's authority to charge fees and the specific language of the auction statute. A Commission rule or order purporting to impose multi-million dollar charges on a licensee without any hint of congressional authorization is therefore "inconsistent with" Congress's specification of fees and charges in Sections 158, 159, and 309(j) of the Act.

Moreover, because the FCC is acting in a manner inconsistent with the terms of the Communications Act, there is no occasion to defer to the agency under step two of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). "[A]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecommunications Corp. v. AT&T*, 114 S. Ct. 2223, 2231 (1994) (citing cases). Here, the FCC's interpretation goes well beyond the point at which it is due any deference.

C. Congress's General Intention to Raise Monies Cannot Support the Commission's Broad Assertion of Section 4(i) Authority in the Face of More Specific Statutory Directions.

The court of appeals also attempted to support its broad interpretation of the agency's authority by relying on some general aspects of Congress's intentions in passing the auction statute. *Mtel*, App. 7a-9a. Intention must be viewed in the context of, and certainly cannot override,

the plain terms of the statute. "The meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States,* 242 U.S. 470, 485 (1917). *See also Rake v. Wade,* 508 U.S. 464, 471 (1993). Those terms are clear; auctions are permitted only "[i]f mutually exclusive applications are accepted for filing . . ." and fees for preference holders are only permitted if the preference was accepted for filing after September 1, 1994. 47 U.S.C. § 309(j)(1) (1994) (App. 86a).[9]

In analyzing congressional intent, the lower court asserts that auctions usually only "make sense" when mutually exclusive applications are accepted because such licenses are valuable. *Mtel,* App. 6a-7a. The court then contends that, since Mtel's license is valuable, Congress would have intended Mtel to be subject to a fee. In essence, the lower court has rewritten the statute to substitute the word "valuable" for the words "mutually exclusive." But this is not the statute Congress passed. Moreover, section 4(i) does not authorize either the FCC or the courts to ignore clear limitations on the agency's authority in the guise of advancing one aspect of congressional intent.[10]

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[9] The lower court's discussion of legislative intent passes over Congress's intent in setting defined limits on the FCC's auction authority.

[10] The lower court analyzes congressional intent as if Congress was simply not aware of the non-mutually exclusive pioneer's preference program. This assumption is belied by the fact that Congress specifically addressed the program in the auction statute, stating that the auction authority should not "be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology." 47 U.S.C. § 309(j)(6)(G) (1994) (App. 90a).

CONCLUSION

Whether agencies with general grants of authority have sweeping implied authority to impose multi-million dollar payments, or to act as they please, is of sufficient importance to warrant plenary review by this Court. Although Mtel will have an opportunity to remand to contest the reasonableness of the FCC's $33.3 million charge, the question of whether the Commission has the authority to impose such a non-statutorily based charge should be determined by this Court now. For the reasons set forth above, Mtel respectfully requests that the Court grant its petition for *certiorari*.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA

Nos. 93-1518, 94-1552 and 94-1553

MOBILE COMMUNICATIONS CORPORATION OF AMERICA, *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

MOBILE TELECOMMUNICATIONS TECHNOLOGIES CORPORATION,
Intervenor.

MOBILE TELECOMMUNICATIONS TECHNOLOGIES CORPORATION, *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

COX ENTERPRISES, INC., *et al.*,
Intervenors.

Appeals of an Order of the
Federal Communications Commission

Argued Dec. 8, 1995

Decided March 8, 1996

Before: EDWARDS, Chief Judge, BUCKLEY and WILLIAMS, Circuit Judges.

Opinion for the Court filed by Circuit Judge WILLIAMS.

Opinion concurring in part and dissenting in part filed by Chief Judge EDWARDS.

STEPHEN F. WILLIAMS, Circuit Judge:

Petitioner Mobile Telecommunications Technologies Corp. ("Mtel") received a "pioneer's preference" in 1993 as a reward for developing technology making it possible to transmit information through the airwaves much faster than had formerly been possible. See Notice of Proposed Rule Making and Tentative Decision, *Amendment of the Commission's Rules To Establish New Personal Communications Services,* 7 F.C.C.R. 5676, 5735-36 ¶¶ 149-51 (1992) ("Tentative Preference Order"); First Report and Order, *Amendment of the Commission's Rules To Establish New Personal Communications Services,* 8 F.C.C.R. 7162, 7172-75 ¶¶ 57-77 (1993) ("Final Preference Order"). The preference entitled Mtel to bypass what had been the traditional mechanism for allocating licenses, through a "comparative hearing," after which the successful applicant would receive a license free of charge. Mtel would instead receive a communications license, specifically a narrowband personal communications service ("PCS") license, without having to face competing applications, and, under the assumptions prevailing when the preference was awarded, without having to pay. Unfortunately for Mtel, Congress drastically changed the background norm for licensing before Mtel could actually receive its license. It amended the Communications Act to allow the Federal Communications Commission to use auctions for allocation of some kinds of licenses (including PCS licenses) when "mutually exclusive applications are accepted for filing," see Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, § 6002

(codified at 47 U.S.C. § 309(j)), i.e., on occurrence of the event that formerly would have triggered a comparative hearing. In the case of a pioneer's preference, this condition for licensing via auctions was not satisfied, as the preference gave its holder a pass on any such competition. But as other parties receiving similar licenses would have to pay for them at market rates, the Commission confronted the issue of how to treat Mtel's prefrence: Should it escape not only competition with other applicants for a license but also the necessity of payment?

The Commission originally ruled that Mtel would not be required to pay. Notice of Proposed Rule Making, *Review of the Pioneer's Preference Rules*, 8 F.C.C.R. 7692, 7694-95 ¶ 18 (1993) ("Pioneer's Preference Review I"); see also First Report and Order, *Review of the Pioneer's Preference Rules*, 9 F.C.C.R. 605, 610 n. 21 (1994) ("Pioneer's Preference Review II") (reaffirming original determination); Memorandum Opinion and Order, *Amendment of the Commission's Rules To Establish New Narrowband Personal Communications Services*, 9 F.C.C.R. 1309, 1316 ¶ 45 (1994) ("Narrowband Order") (same). It then reversed itself, requiring payment of what amounted to a substantially discounted auction price—the *lesser* of "ninety (90) percent of the lowest winning bid for a nationwide narrowband PCS license" and "three million dollars ($3,000,000) less than the lowest winning bid for a nationwide narrowband PCS license." *Nationwide Wireless Network Corp.*, 9 F.C.C.R. 3635, 3639-41 ¶¶ 15-20 (1994) ("Licensing Decision").

Mtel objects that the Commission lacks statutory authority to impose a payment requirement, and that in any event it failed to engage in reasoned decision-making in reaching the determination to impose the payment requirement. We agree with the Commission that it has statutory authority to require payment but find its explanation of imposing the requirement on Mtel inadequate—particularly in its back-of-the-hand treatment of Mtel's

argument that its reliance on the preference as originally conceived called for granting a license free of charge. Accordingly, we remand the case to the Commission for reconsideration of Mtel's contentions.

In addition, petitioner Mobile Communications Corporation of America ("Mobile-Comm"), an unsuccessful applicant for a pioneer's preference, challenges both the original preference grant and the Licensing Decision, basically on the ground that the Commission failed to provide an adequate basis for its award of a preference and, then, a license to Mtel. We reject these contentions.

I. Imposition of a Payment Requirement on Mtel's License

A. *Jurisdiction Over Mtel's Appeal.*

Section 402(b)(1) of the Communications Act gives this court jurisdiction over an appeal of a decision or order of the Commission brought by an "applicant for a construction permit or station license, whose application is denied by the Commission." 47 U.S.C. § 402(b)(1). "Station" is defined by the Communications Act as "a station equipped to engage in radio communication or radio transmission of energy," *id.* § 153(k), and includes mobile as well as land stations. See *id.* § 531(*l*) & (m). Further, § 153 defines "mobile service" in language implying that narrowband PCS is a service involving mobile or land stations or both:

> (n) "Mobile service" *means* a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and *includes* . . . (3) any service for which a license is required in a *personal communications service* established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" [i.e., the Tentative Preference Order]. . . .

Id. § 153(n) (emphasis added). Thus, we have jurisdiction over Mtel's appeal under § 402(b)(1) if, as required by that section, its "application [was] denied by the Commission."

If Mtel's application were an application for a license subject to any sort of condition the Commission might choose to impose, then the Licensing Decision would not be a denial of the application; Mtel was granted a license, though subject to the payment requirement. On the other hand, if, as we think is the case, Mtel was applying for a license *of a specific sort*—here, one free of charge, as had traditionally been the case—then the Licensing Decision is a denial. Several considerations support this view of Mtel's application. First, it made specific reference to its financial terms, namely the associated administrative fee of $230, implying that it was an application for a license *at the price of the administrative fee.* Second, interpreting an application as one for a license subject to any condition of the Commission's choosing would permit the Commission to foreclose judicial review of a de facto denial by couching its decision as an approval subject to some intolerable condition. At least it would have this effect unless § 402(a), allowing review under the Hobbs Act, specifically 28 U.S.C. § 2342, of any attack on an order of the Commission under the wire or radio communications chapter of its authority "except those appealable under [§ 402(b)]" is a general catch-all that picks up anything that falls through the cracks of § 402(b). Whether or not this is true is immaterial for present purposes because Mtel's application is more properly viewed as being for a free license, so that the Commission's order qualifies as a "denial" within the meaning of § 402(b)(1).

Nonetheless, a party whose license application has been denied by approval subject to conditions (other than ones requested by the applicant) must normally comply with the applicable administrative exhaustion requirements.

These include 47 CFR § 1.110, which states that an approval subject to conditions "shall be considered as a grant of such application unless the applicant" files a timely request "rejecting the grant as made," thereby precipitating Commission reconsideration. Normally failure to comply with this requirement bars judicial review. *Central Television, Inc. v. FCC*, 834 F.2d 186, 190-91 (D.C.Cir.1987). Here, however, the Commission explicitly waived the § 1.110 requirement, see Licensing Decision, 9 F.C.C.R. at 3644 ¶ 39, thereby negating the basic reason for the requirement of this form of exhaustion—protecting the Commission's interest in crystallizing its position prior to review. See *Central Television*, 834 F.2d at 191; cf. *Darby v. Cisneros*, 509 U.S. 137 ——-——, 113 S.Ct. 2539, 2542-45, 125 L.Ed.2d 113 (1993) (agency regulation specifying that party "may request" review of hearing officer's determination did not "require" exhaustion within the meaning of § 10(c) of the APA, 5 U.S.C. § 704).

B. *Commission's Authority To Impose a Payment Requirement.*

The Commission based its decision to require payment from Mtel on § 4(i) of the Communications Act, 47 U.S.C. § 154(i), which we have described as the "necessary and proper clause" of the Act. *New England Tel. & Tel. v. FCC*, 826 F.2d 1101, 1108 (D.C.Cir.1987) (quoting *North Am. Telecommunications Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir.1985)). Section 4(i) authorizes the Commission to "perform any and all acts, . . . and issue such orders, not inconsistent with [the Communications Act], as may be necessary in the execution of its functions." Mtel believes the section inapplicable here.

Mtel points first to the specificity of Congress' grants of authority to charge applicants for licenses. Those grants

take two forms. The Commission is under an obligation to impose certain administrative fees in connection with the licensing process. See 47 U.S.C. §§ 158, 159. And, as we have seen, the Commission is empowered under the 1993 amendment to the Communications Act to conduct auctions of specified types of licenses where it has accepted competing applications. Mtel offers up the traditional argument that because the statutory scheme "limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 289, 49 S.Ct. 129, 132, 73 L.Ed 379 (1929). Thus, the payment requirement is "inconsistent with" the Communications Act and not within the Commission's power under § 4(i).

We agree with the Commission, however, that Mtel's reliance on the expressio unius maxim—that the expression of one is the exclusion of others—is misplaced. The maxim "has little force in the administrative setting," where we defer to an agency's interpretation of a statute unless Congress has " 'directly spoken to the precise question at issue.' " *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C.Cir.1991) (quoting *Chevron v. NRDC*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984)). Expressio unius "is simply too thin a reed to support the conclusion that Congress has clearly resolved [an] issue." *Id.*; see also *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 68-69 (D.C.Cir. 1990) (similar). Indeed, we think the nature of Congress's auction authorization more supports than undermines the Commission's decision here. See *Texas Rural Legal Aid*, 940 F.2d at 694 ("[A] congressional prohibition of particular conduct may actually *support* the view that the administrative entity can exercise its authority to eliminate a similar danger.").

The event Congress identified as justifying auctions—the acceptance of mutually exclusive applications—norm-

ally defines the type of license where an auction makes sense: In such cases, there is every reason to believe that the entitlement that the Commission has carved out from de facto ownership by the general public is quite valuable. Thus, an auction will yield reimbursement to the public for the transfer of the entitlement; it will save the public and private expense involved in a comparative hearing; and, because the party able to use the license most efficiently will be able to bid the most, the license will end up in the hands of the firm best able to develop its potential. See H.R.Rep. No. 111, 1st Sess., 1993 U.S.Code Cong. & Admin.News 1993, pp. 378, 767. WL 181528, at *535 (1993) (listing, as goals of auction regime, "promot[ing] the development . . . of new technologies . . . without administrative or judicial delays" and "promot[ing] economic opportunity and competition"); 139 Cong. Rec. S1437-38 (1993) (statement of Sen. Inouye introducing original version of auction legislation) (referring to goals of "promot[ing] economic efficiency, reduc[ing] the administrative burden of issuing licenses, and allow[ing] the Government to receive significant revenues from the use of this public asset"); *id.* S1442 (statement of Sen. Stevens, co-sponsor of the original auction legislation) (similar). By contrast, in the typical case where mutually exclusive applications are not accepted, the license would have negligible value, there would be no need for any comparative hearing (much less a costly one), and the selection of the license recipient would be a foregone conclusion. The license sought by Mtel clearly fits the first set of cases, where the principles supporting an auction are powerful; indeed, but for the Commission's pioneer's preference policy, that license clearly would have fit Congress's criteria for an auction. Mtel is therefore in essence asking us to read congressional intent as follows: Because the Commission *before* the 1993 amendment of the Communications Act had provided for an *exception* to what was then its only way of issuing licenses for which

there was competition, Congres forbade it from *qualifying that exception,* even where doing so would enable the Commission to reap many of the benefits of Congress's own new policy—including obtaining reimbursement for the transfer of a valuable entitlement. We think such a reading untenable.

To put the same point slightly differently: The pioneer's preference itself was a creation of the Commission, *not* an act of subservience to a mandate of Congress. But the congressional provision for auctions sharply widened the *incremental* benefit accruing to a preference, vis-a-vis other would-be license holders. Before, the preference recipient enjoyed an *assured* free license, while its competitors enjoyed a *chance* at a free license; after Congress's provision for auctions, and in the absence of a decision to charge a preference recipient, the recipient would enjoy an assured free license, while its competitors enjoyed only a chance to *buy* a license at the market price (i.e., by paying the government for all the estimated economic rents attributable to the license). This change in the relation between preference recipients and other would-be license holders might properly have led the Commission to drop the preference altogether (at least if it took into account reliance interests based on the prior policy); instead the Commission adjusted the terms of the preference to reduce the gulf between recipients of preferences and other license aspirants.

Contrary to Mtel's contention, our decision in *Railway Labor Executives' Ass'n v. Nat'l Mediation Bd.,* 29 F.3d 655 (D.C.Cir.1994) (en banc), did not enshrine expressio unius as a maxim of universal and conclusive application. The conclusion in *RLEA* that the agency lacked authority for its action followed a careful exegesis of the entire statutory context, the statute's legislative history, and the agency's unvarying practice over a 60-year history. *Id.* at 664-71. In the very different context of the case before

us, we see no conflict between the language and structure of the Communications Act and the imposition of a payment requirement on Mtel.[1]

Mtel argues that even if requiring payment is not directly "inconsistent with" the Communications Act, the lack of affirmative statutory support for the Commission's action proves that it was not "necessary in the execution of [the Commission's] functions" under the Act, as required by § 4(i). In imposing the payment requirement, the Commission relied on its duty to determine "whether the public interest, convenience, and necessity will be served" by the granting of a license application. 47 U.S.C. § 309(a); Licensing Decision, 9 F.C.C.R. at 3639 ¶ 15 & n. 53. In light of that requirement, the payment condition would be "necessary in the execution of [the Commission's] functions" under § 4(i) so long as the Commission properly found it necessary to "ensure the achievement of the Commission's statutory responsibilit[y]" to grant a license only where the grant would serve the

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[1] Congress further amended the regime for auctioning licenses after the Commission had issued the Licensing Decision. See Dissent at 1413; Uruguay Round Agreements Act, Pub.L. No. 103-465, § 801 (1994) (codified at 47 U.S.C. § 309(j)(13)). It is not clear to us how the later legislative developments would shed light on the pre-existing legal situation, but even assuming they could, they do not do so here. The amendment *required*—as opposed to merely authorizing—the Commission to charge for *future* licenses issued to pioneer's preference recipients at rates discounted under a statutorily specified formula. See Uruguay Round Agreements Act § 801 (codified at 47 U.S.C. § 309(j)(13)(A) & (B)). Congress also required that preference recipients of certain already-awarded *broadband* licenses be charged for their licenses. See *id.* (codified at 47 U.S.C. § 309(j)(13)(E)). Congress was silent about the treatment of *narrowband* license recipients such as Mtel. Thus, if one were to infer from the amendment that congressional intent may have been in some way different with respect to already-issued narrowband licenses than with respect to licenses to which the amendment spoke, then the Commission's decision—that it was authorized but *not directed* to charge—would nevertheless be consistent with the amendment.

public interest, convenience, and necessity. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706, 99 S.Ct. 1435, 1444-45, 59 L.Ed.2d 692 (1979) (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968)); see also *Southwestern*, 392 U.S. at 180 n. 46, 88 S.Ct. at 2006 n. 46 (relying on § 4(i) as basis for Commission's authority to act in furtherance of its statutory purpose). We accord substantial deference to "the Commission's judgment regarding how the public interest is best served." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596, 101 S.Ct. 1266, 1275, 67 L.Ed.2d 521 (1981). Here, a finding of the required sort might rest on the unjust enrichment of Mtel from receipt of a free license while, under the new auction regime, others would be required to pay, or (less plausibly) on the prospect of predation by a deep-pocketed Mtel, flush with its free license—both concerns alluded to by the Commission in its Licensing Decision. See 9 F.C.C.R. at 3639-40 ¶¶ 15-18. Thus, the Commission's present reasoning, coupled with an adequate response to Mtel's special objections discussed in part I.C. below, would support a finding that the payment requirement is "necessary in the execution of [the Commission's] functions."

Mtel suggests that this conclusion is belied by Congress's amendment of the Communications Act to authorize auctions of communications licenses. It argues that if the Commission could charge Mtel for its license (apart from the nominal administrative fees) in the absence of explicit statutory authorization, then amendment of the Act to authorize charges would have been unnecessary. But the amendment of the Communications Act necessarily alters any analysis of what is in the "public interest," which is not an issue of abstract political economy but of fulfilling the congressional view of the public interest. Thus, assessment of whether imposition of a charge advances the public interest was quite different against the backdrop of the traditional comparative hearing proce-

dure for allocating licenses than it is against the backdrop of the new auction regime. We are therefore unpersuaded by Mtel's argument that the Commission lacks affirmative authority to impose a payment requirement on Mtel.

C. *Failure To Give Adequate Consideration to Mtel's Reliance Interests.*

Mtel argues that the Commission failed to engage in reasoned decision-making in deciding to impose the payment requirement, and we agree. Given the route by which the Commission reached its decision, the inadequacy is unsurprising. After stating repeatedly that Mtel would not be required to pay, the Commission reversed itself at the eleventh hour. Because the issue appeared settled prior to the Licensing Decision's announcement of the reversal, Mtel did not offer—and thus the Commission did not consider—arguments that imposing a payment requirement would be against the public interest. Mtel's submission to the Commission stated simply—and quite accurately—that "the question of whether Mtel should be required to pay auction level fees [was] addressed on reconsideration in the Narrowband PCS proceeding [Narrowband Order, 9 F.C.C.R. at 1316 ¶ 45], as well as extrajudicially in the Pioneer's Preference review proceeding [Pioneer's Preference Review II, 8 F.C.C.R. at 7694-95 ¶ 18]." Opposition of Mtel, *Nationwide Wireless Network Corp.*, Docket No. 22888-CD-P/L-94. When the Commission reversed course, it failed to address such questions as whether its new position was consistent with the reliance interests of Mtel or with the Commission's decision not to charge for certain other paging system licenses.[2]

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[2] The mere fact that the Commission reversed its position in an adjudicatory proceeding after announcing its initial view in a rule-making proceeding (without, however, actually promulgating a rule on the matter) does not invalidate the shift, contrary to Mtel's contention. "An agency's view of what is in the public interest may change, either with or without a change in circum-

The Commission did address itself to reliance interests of pioneer's preference recipients in a related proceeding—concerned with the payment obligations of *broadband* pioneers. See Memorandum Opinion and Order on Remand, *Amendment of the Commission's Rules To Establish New Personal Communications Services*, 9 F.C.C.R. 4055, 4059 ¶ 17 (1994). The pioneers there argued that the public interest would be best served by granting them "free licenses as a reward for investments and disclosure of information they have made in reliance on their expectation of a preference." *Id.* The Commission rejected this argument, saying that there was no evidence in the record to suggest that the pioneers would not have made the investment and information disclosure if they had known they would have to pay for their licenses. *Id.* But Mtel has had no opportunity to put forth arguments and evidence on the question of reliance, having been lulled into a false sense of security by the Commission's repeated disavowal of intent to charge Mtel. See Pioneer's Preference Review I, 8 F.C.C.R. at 7694-95 ¶ 18; Pioneer's Preference Review II, 9 F.C.C.R. at 610 n. 21; Narrowband Order, 9 F.C.C.R. at 1316 ¶ 45. We think Mtel is entitled to an opportunity to state its reliance concerns and to have the Commission address whatever Mtel may say.

Mtel also suggests that the Commission has undercut its own case for charging Mtel by its contrary decision as to certain other paging system licenses. The Commission notes several distinctions between these licenses and the one granted to Mtel, see Response of FCC to Post-Argument Submission of Mtel, but did not do so in the Licensing Decision, where the surprise move to require payment was made. Accordingly, we remand the case to the Commission for consideration of these issues. See

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stances," as long as the agency "suppl[ies] a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir.1970) (footnotes omitted).

SEC v. Chenery Corp., 318 U.S. 80, 93-94, 63 S.Ct. 454, 461-62, 87 L.Ed. 626 (1943).

II. Grant of Preference and License to Mtel

While Mtel challenges the imposition of a payment condition on its license, MobileComm challenges the grant of both the pioneer's preference and the license to Mtel. We address and reject these claims in turn.

A. *Grant of a Preference to Mtel.*

MobileComm's challenge to the preference grant may be viewed as an attack on the grant of a license, which the pioneer's preference was intended to "guarantee," see Report and Order, *Establishment of Procedures To Provide a Preference to Applicants Proposing an Allocation for New Services*, 6 F.C.C.R. 3488, 3492 ¶ 32 (1991) ("Pioneer's Preference Order") and thus within our jurisdiction under 47 U.S.C. § 402(b)(6), which provides for review at the behest of persons aggrieved by the grant or denial of a license application. Alternatively, the challenge may be viewed as an attack on an order not appealable under § 402(b) and thus within our jurisdiction under § 402(a) and 28 U.S.C. § 2342(1). There being no other apparent possibilities, and the timing and venue provisions of both subsections being satisfied, we have jurisdiction.

According to MobileComm, the Commission, in granting a preference to Mtel, failed to provide an adequate justification for the grant and thus behaved in an arbitrary and capricious fashion in violation of § 10(e)(B)(1) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). Under that section, we must set aside the Commission's action if the Commission failed to "articulate a satisfactory explanation for its action" or reached a conclusion "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*,

463 U.S. 29, 43, 103 S.Ct. 2856, 2867, 77 L.Ed.2d 443 (1983).[a]

The Commission adopted its pioneer's preference rules in order to encourage and reward the development of new and innovative communications services. See Notice of Proposed Rule Making, *Establishment of Procedures To Provide a Preference to Applicants Proposing an Allocation for New Services,* 5 F.C.C.R. 2766, 2766-67 ¶¶ 1-5 (1990); Pioneer's Preference Order, 6 F.C.C.R. at 3488 ¶ 1. Here, it granted a preference to Mtel on the basis of its having "developed . . . what [Mtel] has named 'Multi-Carrier Modulation' ("MCM") technology that is capable of transmitting 24 kilobits per second simulcast in a single 50 kHz channel." See Tentative Preference Order, 7 F.C.C.R. at 5735 ¶ 149; see also Licensing Decision, 9 F.C.C.R. at 3644 ¶ 41 (reiterating basis for preference award). In its effort to show that the Commission's explanation was defective, MobileComm attempts to recast the award as one based on Mtel's use of two specific MCM technologies, "MOOK" and "PSFK." In fact the Commission never explained why MOOK or PSFK might deserve a preference, for the simple reason that it never rested the award on those technologies. Indeed, it never mentioned MOOK or PSFK in its explanation for making the preference award. See Tentative Preference Order, 7 F.C.C.R. at 5735 ¶ 149; Final Preference Order, 8 F.C.C.R. at 7172-75 ¶¶ 57-77. Furthermore, Mtel said in its preference application that it was "*experimenting with*" MOOK and PSFK, as well as with "an innovative FM multitone modulation technique," and that it did not want to tie itself to MOOK or any other

[a] MobileComm also argues that the Commission violated § 309(d) of the Communications Act, 47 U.S.C. § 309(d), in granting Mtel's preference request. We need not decide whether § 309(d), which governs contested *license* grants, applies to the grant of a pioneer's preference; MobileComm's argument under § 309(d)—that the Commission failed to specify the basis for its decision—is the same as its argument under the APA.

specific MCM technology. See Mtel's Petition for Rulemaking, *Mobile Telecommunication Technologies Corp.*, ET Docket No. 92-100 (emphasis added); Mtel's Technical Feasibility Demonstration, *Mobile Telecommunications Technologies Corp.*, ET Docket No. 92-100. Thus, the preference award clearly rested, as the Commission said, on Mtel's having developed and applied MCM technology in a simulcast environment. See Tentative Preference Order, 7 F.C.C.R. at 5735 ¶ 149; Final Preference Order, 8 F.C.C.R. at 7174 ¶ 68. The Commission cannot be faulted for failing to justify a decision it never made.

MobileComm also contends that one cannot understand the award to have been based, as the Commission said, on the development and application of MCM technology in a simulcast environment, because, it says, the Commission failed to answer its claims that Mtel's proposed integration of MCM technology and simulcast paging was neither "new" nor "innovative." See MobileComm's Narrowband PCS Pioneer's Preference Comments, *Amendment of the Commission's Rules To Establish New Personal Communications Services*, ET Docket No. 92-100. In fact the Commission responded at some length. See Final Preference Order, 8 F.C.C.R. at 7173-75 ¶¶ 64-74; see also Tentative Preference Order, 7 F.C.C.R. at 5737-38 ¶ 150. When a party seeks to persuade a non-technical court of the inadequacies of a specialized agency's treatment of a highly technical issue, its burden, as a practical matter, is necessarily quite heavy. Here MobileComm has not begun to pinpoint gaps in the Commission's response that this court could characterize as material.

Finally, MobileComm argues that the Commission's decision to base the preference grant on Mtel's integration of MCM and simulcast paging, rather than on the development and use of specific MCM technologies such as MOOK and PSFK, will "vitiat[e] the FCC's intent and [give] Mtel an opening to use a range of technologies that

did not form the basis for the preference award." Brief of Petitioner at 16. The argument seems to be that the apparently broad basis for the preference grant may limit the force of the Commission's requirement that Mtel use the technology on which the preference is based. Narrowband Order, 9 F.C.C.R. at 1316 ¶¶ 46-48. But Mobile Comm at most identifies a practical issue the Commission will confront in enforcing the preference's limits. We are in no position to say the Commission was arbitrary or capricious in its choice of the level of generality at which to define the preference-winning technology.

B. *License Grant.*

MobileComm recasts its last objection to the preference grant as a challenge under 47 U.S.C. § 402(b)(6) to the Licensing Decision, saying that the Commission failed to respond adequately to its claim that Mtel did not intend to use the technology on which Mtel's preference was based. As to this contention, the Commission found that MobileComm had not raised any substantial and material question of fact, a finding that (if correct) would justify, under 47 U.S.C. § 309(d)(2), the denial of MobileComm's petition to deny Mtel a license. In fact the claims raised by MobileComm were no more than a regurgitation of its previous argument about the technological basis of Mtel's preference. In the licensing venue, MobileComm pointed to various clues that Mtel would not use the MOOK and PSFK modulation techniques that, according to MobileComm but no one else, were the foundation of Mtel's preference. See Licensing Decision, 9 F.C.C.R. at 3644 ¶ 41; MobileComm's Petition To Deny, *Nationwide Wireless Network Corp.*, File No. 22888-CD-P/L-94; *id.* Att. C. As we have seen, however, the Commission based the grant of a preference to Mtel on its having developed and applied MCM technology in a simulcast environment, *not* on its having developed any specific MCM technique. Thus the Commission was quite correct in concluding that MobileComm's evidence

about Mtel's possible non-use of MOOK and PSFK created no substantial and material question of fact under § 309(d)(2). For the same reason, the Commission "articulate[d] a satisfactory explanation for its action" under 5 U.S.C. § 706(2)(A). See *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 103 S.Ct. at 2866.

Its substantive point being feeble, MobileComm endeavors to ensnare the Commission, Mtel and the court in a procedural jumble that turns out to be completely irrelevant. The Communications Act's provision on petitions to deny a license application, § 309(d), is divided into two subsections, which we have read as assigning distinct tasks to the Commission. We have described subsection (1) as instructing the Commission to determine whether a petition to deny sets forth "specific allegations of fact sufficient to show that . . . a grant of the application would be prima facie inconsistent with subsection (a) of this section [requiring that granting the application serve the public interest, convenience, and necessity]," and subsection (2) as telling the Commission (if the first "requirement" is met) to consider whether "on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice," "a substantial and material question of fact is presented." *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 394 (D.C.Cir.1985). MobileComm says that the Commission failed to perform step one of this process.

In the first place we note that, despite *Citizens for Jazz*, we are unable to identify any words in § 309(d)(1) itself that assign any task at all to the Commission. On their face, the words say simply that the *petitioner* is to do various things, against a background set of ancillary rules about the Commission's power to set time limits and the applicant's opportunity to respond. The Commission comes into the picture in § 309(d)(2), which specifies how it is to handle the materials produced under subsection (1). If it finds that no "substantial and material

question of fact is presented," it is to deny the petition and make the grant, and that, as we have seen, is just what the Commission did (with, of course, the added wrinkle that the grant was conditioned).

Nevertheless, it is quite true that in *Citizens for Jazz* we construed § 309(d) as establishing a two-step process. But we have never said that the Commission must plod through the two steps on pain of being reversed. Quite the opposite. In *Citizens for Jazz* we noted that § 309(d) determinations

> "are typically made concurrently: Whether the petition to deny meets the statutory requirements [and] whether the application under consideration raises a factual issue substantial enough to call for a hearing . . . are discussed in the same opinion—*if, indeed, they are discussed separately at all,* which is rarely, since *a negative resolution of the second question alone makes the first question moot. . . .*"

Citizens for Jazz, 775 F.2d at 396 (first emphasis in original; second emphasis added). This, of course, is exactly what happened here.

Astroline Communications Co. v. FCC, 857 F.2d 1556, 1562 (D.C.Cir.1988), is not to the contrary. While we stressed the importance of the two-step process, we did not reverse any conclusion of the Commission based on its failure to perform step one. On none of the four issues to be addressed by the Commission on remand had it performed a proper analysis under step two that would have mooted the supposed error under step one. See *Astroline,* 857 F.2d at 1567 (first issue) ("unrefuted factual record" belied Commission's conclusion that the petitioner had presented no substantial and material question of fact); *id.* at 1570 (second issue) (Commission "failed to articulate adequately its reasons" for concluding that no substantial and material question of fact was presented); *id.* at 1572 (third issue) (Commission's con-

clusion that petitioner had failed to raise a substantial and material question of fact was potentially arbitrary and capricious when viewed in light of substantial issue raised in the petition as to de facto control of applicant); *id.* at 1572-73 (fourth issue) (although decision under step one was not arbitrary or capricious viewed in isolation, context of "persistent misapplication of the statutory mandate" called for a remand, there being no step-two decision at all).

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Accordingly, the case is remanded to the Commission for consideration of whether Mtel's license should be conditioned on payment in light of its claims of reliance and inconsistent treatment of others. In all other respects the petitions for review are denied.

So ordered.

HARRY T. EDWARDS, Chief Judge, dissenting in part and concurring in part:

I agree with the majority that the Federal Communications Commission ("FCC" or "Commission") failed to engage in reasoned decision-making in reaching a determination to require Mobile Telecommunications Technologies Corporation ("Mtel") to pay over $33 million for a license to operate a narrowband personal communications service. As the majority correctly holds, the FCC's "back-of-the-hand treatment" of Mtel surely cannot survive judicial review. However, the FCC's flippant and unreasoned treatment of Mtel is the least of its sins. On the record before us, it is clear that the Commission lacked statutory authority to require Mtel to pay for the license at issue, so there was no legal basis for the action taken. Accordingly, I believe that we must *reverse* the Commission's action and grant the relief sought by Mtel. In all other respects, I concur in the judgment of the majority.

This case involves a small corporation, Mtel, and its efforts to develop and market a two-way data communications service that promised to improve existing data transmission rates by a factor of ten. Mtel invested approximately $50 million in developing this service; its reward was a "pioneer's preference" grant from the FCC that, in the words of the agency, was to be the equivalent of a guarantee of a license to operate its new service.[1] In granting Mtel a pioneer's preference, the FCC applauded Mtel for "solv[ing] significant technical engineering problems" that had stumped its competitors, and described the company's work as "a significant communications innovation of the sort the Commission established

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[1] *See Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services*, 6 F.C.C.R. 3488, 3492 ¶ 32 (1991) (report and order).

the pioneer's preference rules to recognize."[2] On February 3, 1994, after consideration of comments regarding Mtel's receipt of a pioneer's preference, the FCC invited Mtel to apply for a license based on its pioneer's preference.[3]

At all times during consideration of Mtel's pioneer's preference (a process that spanned more than two years), the FCC repeatedly assured Mtel that the license it needed to operate its pioneer's preference technology would be issued for no charge other than the nominal statutory fee due from all licensees. However, at the last stage of the pioneer's preference licensing process, when all that remained was for the FCC to issue a license to Mtel, the Commission suddenly reversed course and made an entirely unprecedented determination that Mtel should be required to pay a fee of over $33 million for its license. Because the FCC has no basis for demanding this payment from Mtel, I must dissent.

There is no dispute that, while Mtel's pioneer's preference and licensing proceedings were underway, dramatic changes were being made in the FCC's operations; however, none of these changes gave the FCC the authority to extort a multi-million-dollar payment from Mtel. Mtel filed for a pioneer's preference in November 1991; the FCC adopted a tentative finding that Mtel's application was successful in July 1992, and affirmed this decision in an order adopted in June 1993. Then, in August 1993, while reconsideration of Mtel's pioneer's preference was

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[2] *Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services*, 8 F.C.C.R. 7162, 7174 ¶¶ 72-73 (1993) (first report and order).

[3] *See Commission Invites Filing of Narrowband Personal Communications Service Pioneer's Preference Application*, FCC Public Notice (Feb. 3, 1994), *reprinted in* Joint Appendix ("J.A.") 672.

underway, the FCC for the first time received permission from Congress to auction spectrum licenses at market value.[4] This right was a major development for an agency that, for almost sixty years, had been confined by statute to charging nominal license fees.

Even though pioneer's preference licenses were not affected by the 1993 change in the law,[5] the FCC sought to evaluate its pioneer's preference program under the auction framework. Part of this evaluation involved consideration of whether the auction process would be adversely affected if pioneer's preference licenses were awarded for nominal fees. Throughout this process, the FCC repeatedly confirmed that Mtel would not be subjected to auction-based fees. The FCC noted that, because Mtel's pioneer's preference had already been granted at the time that Congress gave the Commission auction authority, it would be *inequitable* to charge Mtel an auction-based fee.[6] Thus, before Mtel applied for the license to operate

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[4] *See* 47 U.S.C. § 309(j) (Supp. V 1993).

[5] *See* 47 U.S.C. § 309(j)(6)(G) (Supp. V 1993) ("Nothing . . . in the use of competitive bidding, shall . . . be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology. . . ."); H.R.REP. No. 111, 103d Cong., 1st Sess. 257 (1993) U.S.Code Cong. & Admin.News 1993 pp. 378, 584. ("The provisions of section 309(j) are . . . expressly neutral with respect to [pioneer's preferred] policies.").

[6] *See Review of the Pioneer's Preference Rules*, 8 F.C.C.R. 7692, 7694-95 ¶ 18 & n. 19 (1993) (notice of proposed rulemaking) ("[I]t would be inequitable to apply any change in our rules in [Mtel's] pioneer's preference proceeding."); *Review of the Pioneer's Preference Rules*, 9 F.C.C.R. 605, 610 ¶ 9 & n. 21 (1993) (first report and order) ("We previously determined that, as a matter of equity, nothing in our pioneer's preference review will affect [Mtel's] proceeding, and we adhere to that decision."); *Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services*, 9 F.C.C.R. 1309, 1316 ¶ 45 (1994) (memorandum opinion and order) ("We continue to believe that as a matter of equity we should not apply any new

its pioneer's preference technology in February 1994, the FCC had assured the company on several occasions that, not only would it not be charged a market-value fee for its license, but also that the FCC recognized that the imposition of any such fee would be inequitable.

The FCC got weak-kneed and turned tail on Mtel when a member of Congress cried "wolf." In May of 1994, Congressman John D. Dingell sent a letter to the FCC's General Counsel intimating that pioneer's preference recipients should pay for their licenses;[7] he also proposed legislation to that effect, which would have subjected pioneer's preference licensees to a charge equal to 90% of the highest auction price of similar licenses.[8] *This legislation was never enacted*, but Congressman Dingell's threats apparently succeeded: in July 1994, when the FCC issued Mtel's final licensing order, the Commission suddenly reversed course and essentially adopted Con-

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pioneer's preference rules in this proceeding, because a final order addressed the preference prior to enactment of the 1993 Budget Reconciliation Act. Accordingly, except for our normal established fees, we will not charge Mtel for the license that it may receive pursuant to its preference grant.")

Although the FCC did not specifically address whether Mtel had relied on the existing pioneer's preference framework in pursuing its application, the FCC did observe that other, similarly situated pioneer's preference recipients submitted pioneer's preference requests and "publicly disclosed substantial detail of their system designs in reliance on the continued applicability of the pioneer's preference rules." *Review of the Pioneer's Preference Rules*, 9 F.C.C.R. 605, 610 ¶ 9 (1993) (first report and order). The FCC also noted that, "[h]ad the rules been different, these applicants might have structured their requests differently; or conducted research, development, and experimentation differently; or elected not to disclose detailed information about their systems." *Id.*

[7] *See* Letter from John D. Dingell, Chairman, House Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce, to William Kenard, General Counsel, FCC (May 3, 1994), *reprinted in* J.A. 902-08.

[8] *See* H.R. 4700, 103d Cong., 2d Sess. (1994).

gressman Dingell's suggestion by requiring Mtel to pay 90% of the lowest auction price of similar licenses. The results of an auction conducted shortly thereafter set this amount at $33.3 million.[9]

Recognizing that it had repeatedly promised Mtel a "free" license, and that it had on numerous occasions expounded on the inequity of charging Mtel an auction-based license fee, the Commission was forced to explain its about-face. Not surprisingly, no good explanation was forthcoming. The best the Commission could offer was an obtuse discussion regarding its evolving understanding of the auction process accompanied by an unsupported suggestion that Mtel's "free" license might possibly harm the auction market.[10] The FCC summarized its changed position by declaring that "previously we overvalued . . . equities [favoring Mtel] and undervalued the countervailing competitive concerns."[11] At the end of the FCC's new "valuation," Mtel was the party that ended up short, by over $33 million.

Not only did the FCC fail to justify the inequitable action taken against Mtel, it also failed to locate a statutory basis for the fee Mtel was to pay. It is undisputed that *the FCC has never before in its history imposed a licensing fee absent explicit authorization from Congress. It is also conceded that there is no such authorization in this case.* Obviously, the FCC could not rely on Representative Dingell's proposed but unenacted legislation as authority for its sudden decision to charge Mtel. In the

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[9] The FCC's licensing order required Mtel to pay 90% of the lowest winning bid for a narrowband personal communications service license, or $3,000,000 less than the lowest winning bid for such a license, whichever was less. *See Nationwide Wireless Network Corp.*, 9 F.C.C.R. 3635, 3646 ¶ 50(4) (1994) (memorandum opinion and order). As it turned out, the lesser of these options was for Mtel to pay 90% of the lowest auction bid, or $33.3 million.

[10] *See id.* at 3640 ¶¶ 17-19.

[11] *Id.* at 3640 ¶ 19.

absence of statutory authorization for the fee it sought to impose, the FCC concocted an argument to support its action by bridging together its general authority to administer the Communications Act, found in 47 U.S.C. § 154(i) ("section 4(i)"), and the auction framework that Congress established in 1993 to govern non-pioneer's preference licensees in 47 U.S.C. § 309(j) ("section 309(j)"). Charitably speaking, the argument is something akin to the FCC saying that it "has the power to do whatever it pleases merely by virtue of its existence," a suggestion that this court normally would view as "incredible." *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 659 (D.C.Cir.1994) (en banc), *cert. denied*, —— U.S. ——, 115 S.Ct. 1392, 131 L.Ed.2d 243 (1995).

Congress apparently did not share such an expansive view of the FCC's authority under the existing law, because, in late 1994, it decided to pass a statute specifically authorizing the FCC to collect fees from pioneer's preference license recipients.[12] Under any other circumstances, Mtel would likely have celebrated this legislation, because the effective date of the provision served to exclude Mtel's pioneer's preference license from the new fees.[13] However, the FCC's decision to charge Mtel a fee a few months earlier, irrespective of whether Congress had authorized such a payment, deprived Mtel of the exemption Congress provided.

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[12] *See* 47 U.S.C.A. § 309(j)(13)(B) (Supp.1995). This provision sets forth a very detailed formula by which the FCC is to compute the fee that pioneer's preference license recipients are to pay.

[13] As the FCC has acknowledged, the pioneer's preference payment statute does " 'not apply to applications that have been accepted for filing on or before September 1, 1994.' " Brief for Appellee at 18 (quoting 47 U.S.C. § 309(j)(13)(D)(iv)). Mtel's license was issued in July 1994, subject to the disputed fee.

Counsel for the FCC conceded at oral argument that neither of the sections upon which the FCC relies permit it to charge Mtel a fee: section 4(i), which speaks in general terms, does not alone authorize the imposition of such a fee, and, it is clear that section 309(j) does not permit a fee in Mtel's case. Thus, the FCC claims that, because it has general authority over the communications industry and because it can assess fees to parties other than Mtel, it is therefore free to charge Mtel as well. As noted above, this kind of argument was rejected in *Railway Labor Executives' Association* where the *en banc* court categorically dismissed the idea that an agency "possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area." 29 F.3d at 670. Under the FCC's logic, as soon as Congress grants the agency permission to engage in certain conduct, such as charging market-value license fees, on an explicitly-defined basis, section 4(i) automatically confers the right to apply that power across the board. If this reading were correct, it would completely eviscerate the power of Congress to determine the scope of the statutes it passes. As this court has held, "it is beyond cavil that 'an agency's power is no greater than that delegated to it by Congress,'" *Id.* (quoting *Lyng v. Payne*, 476 U.S. 926, 937, 106 S.Ct. 2333, 2341, 90 L.Ed.2d 921 (1986)), and "[t]he *duty* to act under certain carefully defined circumstances does not subsume the *discretion* to act under other, wholly different, circumstances, unless the statute bears such a reading," *id.* at 671.

Even if I were to assume the fallacious premise that section 4(i) could bestow upon the FCC the authority to charge Mtel for its license, there is *no* indication that the charge is "necessary" to the FCC's functions. The Commission's justification for the charge is that granting Mtel a free license could harm the public interest by jeopardizing competition in the communications industry.

This justification is belied by the fact that the FCC is presently awarding licenses to *competitors* of Mtel with no such fee attached.[14]

Further, Mtel and other pioneer's preference applicants made large investments in research and development of new products in reliance on the pioneer's preference framework as it existed before the FCC's auction authority. Mtel asserts that it continued to invest in improving the capabilities of its system after the pioneer's preference was granted.[15] Only an extraordinarily naive person could believe that the FCC's repeated promises that Mtel would not be charged an auction-based license fee did not affect Mtel's allocation of its resources to this endeavor.

At oral argument, counsel for the FCC was disinclined to address the agency's various guarantees that Mtel would not be charged an auction-based fee.[16] There was nothing of substance for him to offer by way of explanation, so counsel's reluctance was savvy. Nonetheless, counsel's inability to respond in no way obscures the obvious: in addition to being lawless, the FCC's action in this case borders on outrageous. I dissent.

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[14] As the majority concedes, Mtel has submitted information indicating that the FCC has recently issued paging licenses without subjecting the recipients to auction-based fees.

[15] *See, e.g.*, Letter from R. Michael Senkowski & Eric W. DeSilva, counsel for Mtel to William Caton, Acting Secretary, FCC 3 (Apr. 26, 1994), *reprinted in* J.A. 879 ("Mtel has kept its commitments to the Commission by strengthening its financing and improving the service's technological capabilities since the award was made.")

[16] Transcript of Oral Argument at 28.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

File No. 22888-CD-P/L-94

In re Application of
Nationwide Wireless Network Corp.

For a Nationwide Authorization
in the Narrowband Personal
Communications Service

MEMORANDUM OPINION AND ORDER

Adopted: July 13, 1994; Released: July 13, 1994

By the Commission: Commissioner Quello concurring and issuing a statement at a later date; Commissioner Ness issuing a statement; Commissioner Chong not participating.

I. INTRODUCTION

1. On February 10, 1994, Nationwide Wireless Network Corp. (NWN Corp.)[1] filed the above-captioned ap-

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[1] NWN Corp. is a wholly-owned subsidiary of Mobile Telecommunication Technologies Corporation (Mtel). We note that petitioners express some confusion regarding applicant's name. *See* BellSouth Companies Reply at n.41 and PageNet Reply at n.2. Mtel filed a minor amendment to the application stating that NWN Corporation had changed its name to Nationwide Wireless Network Corporation. *See* Letter from Jai P. Bhagat to James H. Bennett (March 25, 1994). Mtel later filed a minor amendment to its application stating that the Delaware corporation records state that the applicant's name is Nationwide Wireless Network Corp. rather than Nationwide Wireless Network Corporation. Mtel

plication for a 50 kHz unpaired nationwide license in the narrowband Personal Communications Service (PCS). Two petitions to deny (Petitions) were filed, one by BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corporation, and Mobile Communications Corporation of America (the "BellSouth Companies") and one by Paging Network, Inc. (PageNet) (jointly "Petitioners").[2] For the reasons set forth below, we deny the Petitions to the extent indicated here and grant NWN Corp.'s application subject to the conditions set forth here.

2. By this action, we award the first commercial license for Personal Communications Service. We expect this service to contribute to the development of the National Information Infrastructure by providing Americans with ubiquitous access to wireless data and voice services. We further expect the introduction of commercial narrowband PCS will result in the creation of new jobs, increase productivity, and provide the basis for more effective U.S. competition in the global telecommunications market.[3]

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asserts they have elected to notify the Commission of the use of the Corp. abbreviation in order to "ensure the complete accuracy of the Commission's records." *See* Letter from Jai P. Bhagat to James H. Bennett (April 26, 1994). We refer to Mtel and NWN Corp. interchangeability in this order.

[2] PageMart, Inc. also filed a Petition to Deny that was subsequently withdrawn. Withdrawal of Petition to Deny filed June 16, 1994 by PageMart, Inc.

Mtel challenges the Petitioners' legal standing under Section 309 of the Act to file petitions to deny given, among other things, the Petitioners "ineligibility to file competing applications and the different markets to be served by their proposed PCS offerings." Opposition of Mobile Telecommunication Technologies Corporation and Nationwide Wireless Network Corporation (Mtel Opposition) at n.4. Mtel has not persuaded us that Petitioners do not have standing.

[3] *See* Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, GEN Docket No. 90-314 and ET Docket No. 92-100, Memorandum Opinion and

II. BACKGROUND

3. In July 1992, the Commission tentatively granted to Mtel a pioneer's preference for having developed and demonstrated the feasibility of significant innovations that will permit the delivery of existing and new advanced paging and messaging service in a spectrum-efficient manner.[4] In June 1993, the Commission granted a final pioneer's preference to Mtel and determined that it should receive a nationwide license for a 50 kHz unpaired block. The grant was affirmed on reconsideration with the imposition of a number of conditions.[5] Specifically, the Commission directed the licensing bureau to condition any license granted to Mtel based on its pioneer's preference upon Mtel's agreement to build a system that substantially uses the design and technologies upon which that award is based;[6] and to hold the license for a minimum of three years or until the construction requirement applicable to the five-year build-out period has been satisfied, whichever occurs first.[7]

Order, 9 FCC Rcd 1309, at para. 3 (1994) (*"Narrowband Reconsideration"*), *recon. pending*.

[4] Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314 and ET Docket No. 92-100, Notice of Proposed Rule Making and Tentative Decision, 7 FCC Rcd 5676, 5735-36 (1992).

[5] Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, GEN Docket No. 90-314 and ET Docket No. 92-100, First Report and Order, 8 FCC Rcd 7162, 7172-75 (1993) (*"Narrowband Order"*); *recon. granted in part, Narrowband Reconsideration*, 9 FCC Rcd at 1315-17 (1994); *further recon. pending; appeal pending sub nom. BellSouth Corp. v. FCC*, No. 93-1518 (D.C. Cir. filed Aug. 20, 1993).

[6] This condition applies only for the nationwide channel for which the preference has been granted and only until Mtel has satisfied the initial five-year build-out requirement in the rules. *Narrowband Reconsideration*, 9 FCC Rcd at 1316, para. 47.

[7] *Id.* at para. 48.

4. The Commission also directed the Common Carrier Bureau (Bureau) to issue a Public Notice inviting Mtel to submit an application.[8] In addition, the Commission directed the Bureau to consider conditioning any license granted to Mtel as a result of its pioneer's preference on Mtel's agreement to a stricter build-out requirement than the requirement generally applicable in the ten-year build-out period for licenses in the narrowband PCS service.[9] In February 1994, the Bureau issued the Public Notice and, as directed by the Commission, stated that it would consider the possibility of imposing a stricter build-out requirement on Mtel, such as requiring the construction of base stations that serve 90 percent of the United States population within 10 years after the grant of the license.[10] On February 10, 1994, Mtel submitted its application, which was placed on Public Notice on February 25, 1994.[11] The two petitions to Deny were filed on March 28, 1994. Mtel's Opposition was filed on April 7, 1994, and replies to its Opposition were filed on April 19, 1994.[12]

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[8] *Id.*, 9 FCC Rcd at 1316 n.26.

[9] *Id.*

[10] Commission Invites Filing of Narrowband Personal Communications Service Pioneer's Preference Application, Public Notice, No. 41645 (released Feb. 3, 1994) (*"February 3 Public Notice"*).

[11] Common Carrier Public Mobile Services Information, Public Notice, No. 41903 (released February 25, 1994). File No. 22888-CD-P/L-94 was assigned to the application. A subsequent Public Notice was issued reminding interested parties that the Commission will consider the imposition of stricter build-out requirements on Mtel than applicable to other narrowband PCS licensees and inviting interested parties to address this issue in petitions to deny. Common Carrier Public Mobile Service Information Supplemental Notice Inviting Comments, Public Notice, No. 42032 (released Mar. 7, 1994).

[12] In addition to the amendment to its application noted above, *supra* note 1, on April 26, 1994, Mtel also filed a letter in response to a claim made by the BellSouth Companies in their Reply regard-

III. DISCUSSION

A. Petitions to Deny, Opposition, and Replies

5. Petitioners advance a number of arguments to support their contention that we should not grant Mtel's application.[13] Petitioners argue that we should deny the application because Mtel does not intend to offer service using the specific technology for which it was awarded a pioneer's preference.[14] Petitioners request that we investigate Microsoft Corporation's investment in Mtel [15] to de-

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ing the applicant's identity, existence, and corporate status. Mtel contends that we should accept its letter response because the BellSouth Companies improperly raised this claim for the first time in their Reply to Mtel's Opposition. Letter from R. Michael Senkowski to William Caton, Acting Secretary (April 26, 1994) ("Mtel Response"). To the extent the Mtel Response addresses the issue raised for the first time in BellSouth Reply, we will accept the Mtel Response for filing in order to assure that we have a complete record in this proceeding. The BellSouth Companies filed a Reply to the Mtel Response on May 6, 1994 ("Reply to Response"). We accept BellSouth's Reply to Response for filing.

[13] The arguments made by the Petitioners are, for the most part, identical in their essentials. To the extent that individual Petitioners make unique or separate arguments, we address them accordingly.

[14] BellSouth Companies Petition at 6-16 and Reply at 4-11; PageNet Petition at 2-6 and Reply at 2-6.

[15] On March 23, 1994 Mtel entered into agreements contemplating investments in NWN Corp. by Microsoft, William Gates, Paul Allen, Integral Capital Partners (Integral), and Kleiner Perkins Caufield & Byers (KPCB). Concurrent with the consummation of the transactions, NWN Corp.'s Board of Directors would be expanded to six members with Mtel having the right to appoint four directors and Microsoft and KPCB each having the right to appoint one director. Mtel would designate the officers of NWN Corp. The appointment of the President, Chief Operating Officer, and Chief Financial Officer of NWN Corp. would require the approval of either the Director appointed by KPCB or the Director appointed by Microsoft, which could not unreasonably be withheld. The proposed agreement provides for certain minority shareholder protections

termine whether a *de jure* or *de facto* transfer of control of NWN Corp. to Microsoft would take place if these transactions are consummated.[16] In addition, the BellSouth Companies and PageNet contend that the application cannot be granted because application requirements, filing rules, and procedures for narrowband PCS have not been adopted by the Commission and, because such requirements, rules, and licensing procedures are not in place, we cannot make the necessary public interest finding under Section 309 of the Communications Act of 1934, as amended, (the "Act").[17]

6. The BellSouth Companies also argue that we cannot grant the application without first determining the existence, identity and corporate status of the applicant.[18] In support of their claims, the BellSouth Companies pro-

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and the approval of five of the six Directors (supermajority approval) for the following extraordinary measures: (1) issuance of equity securities; (ii) sale, recapitalization, or liquidation; (iii) redemption of voting securities; (iv) asset acquisitions or investments in excess of $5 million or 5 percent of the company's assets, whichever is greater; (v) creation of any wholly-owned subsidiaries; (vi) approval of the annual budget and strategic plan; (vii) amendment of the charter documents to change voting provisions for stockholder action; and (viii) grant of stock options. The equity and voting rights in NWN Corp. after consummation would be: Mtel - 80.57 percent; Microsoft - 8.52 percent; KPCB - 4.66 percent; William Gates - 2.84 percent; Paul Allen - 2.84 percent; and Integral - 0.57 percent. Opposition at 5-7.

[16] BellSouth Companies Petition at 3-6; PageNet Reply at 8-10.

[17] BellSouth Companies Petition at 16-22; PageNet Petition at 6-18 and Reply at 12-13. PageNet also argues that we cannot grant the application because Mtel has failed to comply with Section 310(b) of the Act, which limits alien ownership interests in Commission licensees. PageNet points out that applicants routinely conduct surveys of their stockholders to acquire the information necessary for them to know with reasonable certainty that they are in compliance with alien ownership restrictions. PageNet Petition at 16-18 and Reply at 6-8.

[18] BellSouth Companies Reply at 11-16.

vide a number of documents from the State of Delaware which they assert show that the applicant appears to be nonexistent.[19]

7. PageNet contends that Mtel should be required to pay for its license.[20] Specifically, PageNet argues that the stated purpose of the pioneer's preference rules was to "assure the party granted a preference that it would receive a license to implement its innovative technology."[21] PageNet contends that the failure to require Mtel to pay for its license would create an enormous "cost structure disparity" between Mtel and other parties who may, through our narrowband PCS competitive bidding procedures, pay millions of dollars for each of the remaining ten nationwide narrowband PCS licenses. PageNet argues that giving Mtel a free license would undermine competitive conditions in narrowband PCS "without promoting any of the purposes underlying the award of the preference to Mtel"[22] while providing Mtel with a tremendous cost advantage over similarly situated competitors. According to PageNet, Mtel's subscriber costs should be lower because it does not have to pay for the license and it will receive an even greater competitive advantage because it does not have to obtain debt financing to pay for the license. PageNet further contends, that by allowing a preference that is equivalent to a free license in an auction environment, "the Commission is directly influencing the cost structure, the debt and equity structure, and the competitive outcome of PCS."[23] PageNet argues that the Commission is creating barriers to entry by giving Mtel the equivalent of millions of dollars. PageNet further

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[19] *Id.* at 12-14 and Exhibits B, C, D, and E.

[20] PageNet Petition at 18-24.

[21] *Id.* at 18.

[22] *Id.* at 19.

[23] *Id.* at 20.

contends that the competitive advantage of a preference to Mtel also will affect traditional nationwide paging because Mtel could price its narrowband PCS service well above costs and still remain competitive with those whose costs include license costs in addition to construction and operating costs.[24]

8. PageNet also argues that Section 309(a) of the Act requires the Commission to consider the competitive ramifications of granting a pioneer's preference in an auction environment in order to determine whether the grant of Mtel's application is in the public interest. PageNet asserts that there are no public interest benefits that would outweigh the competitive harm created by a free grant to Mtel. PageNet contends that, because the Commission has authority to conduct auctions and every applicant has the certainty that it may acquire licenses through those auctions, the purpose of creating pioneer's preferences has been fulfilled, that is, the Commission has reduced the delays and risks inherent in its allocation and licensing procedures.[25] PageNet also argues that the grant of a free license to Mtel would skew the auction process by inflating the value of the remaining licenses to Mtel and deflating their value to others. Specifically, PageNet asserts that, to the extent Mtel could achieve economies of scale and scope by operating several 50 kHz channels, it could achieve, through cost averaging, a much higher level of profitability than others. PageNet contends that Mtel could use the money it saves from the free license to overbid for additional licenses.[26]

9. PageNet further argues that we should not grant a license to Mtel because a proposed repeal of the pioneer's preference regime is currently pending with the Commis-

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[24] *Id.* at 21.

[25] *Id.* at 22-23.

[26] *Id.* at 23.

sion, the grant of a pioneer's preference to Mtel was illegal, the entire pioneer's preference regime is unlawful, and the grant would give Mtel an unfair and anticompetitive headstart in providing narrowband PCS services.[27] In addition, PageNet contends that award of a license to Mtel would violate the doctrine of *Ashbacker v. FCC*[28] because the Commission's public notice invited only Mtel to submit an application.[29] PageNet alleges that it would have filed a competing application if permitted by the Commission's notice.[30]

10. Finally, the BellSouth Companies argue that a number of conditions, in addition to those already imposed by the Commission, should be placed on Mtel's grant. Specifically, the BellSouth Companies argue that we should further condition Mtel's license on its compliance with the following requirements: (i) service should be provided to every one of the Basic Trading Area (BTA) service areas; (ii) after 10 years, 90 percent of the population of every BTA service area should be covered, with 45 percent of the population of every BTA service area covered at the 5-year mark; and (iii) transfer of the license should be forbidden unless Mtel provides service to 90 percent of the population of every BTA service area.[31]

11. In its Opposition, Mtel counters that its application specifically acknowledges and accepts the three con-

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[27] *Id.* at 25-31.

[28] 326 U.S. 327 (1945). The Court held that under the Communications Act all *bona fide*, competing applications are entitled to comparative consideration.

[29] PageNet argues that granting a pioneer's preference to Mtel unlawfully grants it a license without subjecting it to a comparative hearing.

[30] PageNet Petition at 36-39.

[31] BellSouth Companies Petition at 22-24 and Reply at 17-19.

ditions that the Commission has adopted or proposes to adopt[32] that would require Mtel to: (i) build a system that substantially uses the designs and technology on which the preference award was based;[33] (ii) hold the license for three years or until the construction requirements applicable to the five-year build-out period have been met (whichever occurs first); and (iii) satisfy stricter build-out requirements than those for other 900 MHz narrowband PCS licensees. Mtel argues that the exhibits to its application demonstrate that it is legally, technically, and financially qualified to receive a narrowband PCS authorization.[34] Mtel further contends that the

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[32] The *Narrowband Reconsideration* order mandates that any license granted to Mtel based on its pioneer's preference award *must* include conditions requiring Mtel: to build a system that substantially uses the design and technologies upon which that award is based; and to retain the license for a minimum of three years or until the construction requirement applicable to the five-year build-out period has been satisfied, whichever occurs first. 9 FCC Rcd at 1316, paras. 47-48. In addition, the Commission concluded that consideration should be given to requiring Mtel, as a further condition on its receipt of a license based on its pioneer's preference, to comply with a build-out requirement stricter than the requirement applicable to the ten-year build-out period. 9 FCC Rcd at 1316 n.26.

[33] Mtel states that

> [i]n light of the unambiguous statements in Mtel's application regarding the NWN system, there is simply no factual or legal basis for petitioners' assertions that Mtel will not deploy the innovations for which it was granted a preference.

Mtel Opposition at 4.

[34] For example, in its Financial Qualifications exhibit, NWN Corp. provides (i) an estimate of the construction costs for a 300 MSA/500 base station transmitter "Nationwide Wireless Network" (NWN) system and an estimate of the costs to operate the system for a period of one year; (ii) audited financial statements for Mtel dated March 1, 1993, including a balance sheet, as submitted to the Securities and Exchange Commission, for the year ending December 31, 1992; and (iii) unaudited balance sheets for Mtel dated September 30, 1992, including, as a supplement, a description of

more stringent build-out requirements argued for by the BellSouth Companies "are disproportionate with anything the Commission should rationally expect from any single terrestrial-based service provider." [35] With regard to investment of Microsoft and others in NWN Corp., Mtel states that it will retain *de jure* and *de facto* control of NWN Corp. even after the consummation of the transactions and no minority investor will exercise control.[36] With regard to questions raised by PageNet regarding Section 310(b) alien ownership restrictions, Mtel states that it has "received the results of a third-party alien ownership survey which shows compliance with all applicable alien ownership limitations." [37] In response to the BellSouth Companies' claims regarding the applicant's identity, Mtel claims that there was a minor discrepancy in NWN Corp.'s incorporation chronology due to miscommunications with Mtel's Delaware counsel. Mtel claims that it filed its narrowband PCS application on February 10, 1994, under the name NWN Corp., on the understanding that this new wholly-owned subsidiary had been incorporated, when the incorporation was not effected until February 25, 1994. Mtel argues that this discrepancy did not affect the substance of the application or the ultimate ownership and control of the applicant by the parent corporation, Mtel.[38]

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the financial resources available to finance construction and operating costs for a period of one year of a 300 MSA/500 base station transmitter NWN system. On February 22, 1994, Mtel amended the application to provide a more current balance sheet. The application also includes a letter from Mtel guaranteeing the availability of funds for constructing and operating the NWN system. *See* Exhibit 3, Attachment 2.5.

[35] Mtel Opposition at 10.

[36] *Id.* at 5-9.

[37] *Id.* at 11.

[38] Mtel Response at 2-3. Mtel included, with its Response, a Declaration from Jai P. Bhagat, President of NWN Corp., setting

12. Mtel also contends that Petitioners' arguments concerning the grant of a pioneer's preference to Mtel, the legality of the pioneer's preference policies, the payment of a fee for its license, grandfathering Mtel from any changes adopted in the pioneer's preference review proceeding, and the delay of a grant to Mtel to eliminate any possible headstart advantages have previously been considered and rejected by the Commission. Accordingly, Mtel asserts that these challenges should be summarily rejected.[39]

B. Discussion

1. Pioneer's Preference Issues

13. *Ashbacker Doctrine.* The Commission has dealt with the applicability of the Ashbacker Doctrine to pioneer's preferences at length in the pioneer's preference proceeding, where we concluded that our pioneer's preference rules are not precluded by *Ashbacker.*[40] We also have previously considered and rejected PageNet's argument that grant of a pioneer's preference to Mtel is unlawful because Mtel's proposal is not innovative or spectrally efficient.[41] PageNet's argument that we cannot grant Mtel a license because the entire pioneer's preference regime is unlawful is also without merit. The pioneer's preference rules were adopted through notice-and-

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forth the chronology of events, confirming that the applicant is NWN Corp., and listing the Officers, Directors and Shareholders of NWN Corp., who are identical to those listed in the application.

[39] Mtel Opposition at 12-14.

[40] Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, GEN Docket No. 90-217, Report and Order, 6 FCC Rcd 3488, 3492 at para. 33 (1991); Memorandum Opinion and Order, 8 FCC Rcd 1659 (1993).

[41] *Narrowband Order*, 8 FCC Rcd at 7173.

comment rulemaking [42] in accordance with our rules and the applicable requirements of the Administrative Procedure Act. PageNet does not contend that the pioneer's preference rules are not lawful as a result of a deficiency in the procedures followed in promulgating the rules. Moreover, as noted above, the Commission fully addressed the substantive legality of the pioneer's preference rules. In addition, the fact that the Commission is still considering repeal or modification of the pioneer's preference rules for future proceedings is irrelevant to this application.[43] Accordingly, we will not revisit these particular issues here.

14. *Headstart.* We have also considered and rejected PageNet's arguments concerning any headstart that Mtel might receive. In the *Narrowband Reconsideration*, we found that Mtel is receiving no more than a *de facto* headstart and rejected proposals to delay processing of Mtel's application.[44] We have recognized from the outset that pioneer's preference grantees may receive a *de facto* headstart because of the nature of our licensing process.[45] We note that we have recently taken the next steps in implementing our auction authority to deploy PCS rapidly

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[42] Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, GEN Docket No. 90-217, Report and Order, 6 FCC Rcd 3488 (1991) (*"Pioneer's Preference Report and Order"*), *recon. granted in part*, Memorandum Opinion and Order, 7 FCC Rcd 1808 (1992), *further recon. denied*, Memorandum Opinion and Order, 8 FCC Rcd 1659 (1993).

[43] Review of the Pioneer's Preference Rules(ET Docket No. 93-266, Notice of Proposed Rule Making, 8 FCC Rcd 7692 (1993) (*"Pioneer's Preference Review NPRM"*); Review of the Pioneer's Preference Rules, ET Docket No. 93-266, First Report and Order, 9 FCC Rcd 605 (1944) (*"Pioneer's Preference Report and Order"*).

[44] *Narrowband Reconsideration*, 9 FCC Rcd at 1317, para. 51.

[45] *Pioneer's Preference Report and Order*, 6 FCC Rcd at 3492 (1991). We specifically declined to provide a headstart beyond any such *de facto* headstart.

by adopting competitive bidding rules to award narrowband PCS licenses.[46] and by scheduling the auction for the remaining ten nationwide narrowband PCS licenses for later this month.[47] PageNet's concerns over any *de facto* headstart Mtel may receive should be largely alleviated by these actions.[48]

15. *Payment for License.* Arguments that Mtel should pay for its license have been considered in both the *Pioneer's Preference Review NPRM* and the *Narrowband Reconsideration.* In the *Narrowband Reconsideration,* we held that, as a matter of equity, we would not charge Mtel for the license that it may receive pursuant to its pioneer's preference award because a final order (albeit subject to pending petitions for reconsideration) addressed the preference prior to the enactment of the Omnibus Budget Reconciliation Act of 1993[49] that gave the Commission authority for competitive bidding.[50] At the outset,

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[46] Implementation of Section 309(j) of the Communications Act, PP Docket No. 93-253, FCC 94-98, Third Report and Order (released May 10, 1994). *See also* FCC Adopts Competitive Bidding Rules to Award Narrowband PCS Licenses (PP Docket No. 93-253), News Release, Report No. DC-2590 (Apr. 20, 1994) (*"April 20 News Release"*).

[47] *See* FCC to Hold Narrowband PCS and IVDS Auctions July 24-29, 1994, News Release, Mimeo No. 43178 (released May 23, 1994); and Auction Notice and Filing Requirements for Ten Nationwide Licenses for Personal Communications Services in the 900 MHz Band, Public Notice, Report No. AUC-94-01, Auction No. 1 (released May 23, 1994) and Erratum to Report No. AUC-94-01 (released May 27, 1994).

[48] The Commission has determined that the first narrowband PCS auction would include the ten available nationwide narrowband PCS licenses. *April 20 News Release* at 2.

[49] Pub. L. No. 103-66, Title IV, § 6002, 107 Stat. 387 (enacted Aug. 10, 1993).

[50] *Narrowband Reconsideration,* 9 FCC Rcd at 1316, para. 45. *See also Pioneer's Preference Review NPRM,* 8 FCC Rcd 7692, 7694-95, para. 18 (Nothing in the review of the pioneer's pref-

we note, that since the adoption of the *Pioneer's Preference Review NPRM* in October 1993 and the *Narrowband Reconsideration* in February 1994, we have adopted four reports and orders in the Competitive Bidding proceeding setting forth general auction rules and specific auction rules for narrowband PCS, interactive video data services (IVDS), and broadband PCS.[51] This has led to a greater understanding of how the competitive bidding process will work in the context of the award of spectrum for various services and, in particular, narrowband PCS. It has also resulted in concern over the effect on the marketplace that the award of a free license to one competitor will have when other competitors must bid and pay for licenses in the same service. In particular, and in light of the arguments raised by PageNet, we are concerned that the award of a free license to Mtel would create an unfair competitive advantage for Mtel at the expense of licensees who may pay significant sums for their licenses. While we have previously decided that Mtel should not have to pay for its license for equitable

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erence rules (for applicability of competitive bidding) will affect the Mtel proceeding). The Commission also decided that it would be inequitable to apply any pioneer's preference rule changes, including competitive bidding, to pioneer's preference proceedings in which *tentative* decisions had been made. *See Pioneer's Preference Review Report and Order.*

[51] Implementation of Section 309(j) of the Communications Act, PP Docket No. 93-253, FCC 94-61, Second Report and Order, 9 FCC Rcd 2348 (1994) (*"Competitive Bidding Second Report and Order"*) (*general auction rules*); Implementation of Section 309(j) of the Communications Act, PP Docket No. 93-253, FCC 94-98, Third Report and Order (released May, 10 1994) (*"Competitive Bidding Third Report and Order"*) (*narrowband PCS auction rules*); Implementation of Section 309(j) of the Communications Act, PP Docket No. 93-253, FCC 94-99, Fourth Report and Order, 9 FCC Rcd 2330 (1994) (*IVDS auctions rules*); and Implementation of Section 309(j) of the Communications Act, PP Docket No. 93-253, FCC 94-178, Fifth Report and Order (adopted June 29, 1994) (*broadband PCS auction rules*).

reasons,[52] we are required by Section 309 of the Act to determine whether the grant of a license to Mtel would serve the public interest, convenience, and necessity.[53] Accordingly, as a petition to deny has specifically raised an issue with regard to payment by Mtel for its license, we will consider the issue as part of our Section 309 determination here.

16. In adopting the pioneer's preference procedures, the Commission was concerned with fostering the development of new services and improving existing services by reducing the delays and risks for innovators associated with the Commission's allocation and licensing processes.[54] In particular, the Commission was concerned that an innovator facing a lottery situation would have no assurances of receiving a license and therefore no ability to obtain a license as a reward for its efforts.[55] We decided that a significant reward should be given to induce innovators to present proposals for new technologies and services to the Commission in a timely manner. In crafting this "reward," we did not intend to award a competitive advantage to an innovator by giving it a license for free while its competitors had to pay, but rather

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[52] *See* note 4950, *supra*, and accompanying text.

[53] Section 309(a) of the Act provides that

> Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that the public interest, convenience, and necessity will be served by the granting thereof, it shall grant such application.

47 U.S.C. § 309(a).

[54] *Pioneer's Preference Report and Order*, 6 FCC Rcd at 3488, para. 1.

[55] *Pioneer's Preference Review NPRM*, 8 FCC Rcd 7692, paras. 1 and 5.

decided to permit an otherwise qualified pioneer's preference recipient to apply for a license without facing competing applications.[56]

> Our objective in establishing a pioneer's preference is to reduce the risk and uncertainty innovating parties face in our existing rule making and licensing procedures, and therefore to encourage the development of new services and new technologies. The essence of this risk and uncertainty is that they may not be awarded a license and, therefore, may not be able to take their developmental work into full business operation. *The most workable action we can take to reduce this risk is effectively to guarantee an otherwise qualified innovating party that it will be able to operate in the new service by precluding competing applications.*[57]

The Commission concluded that it has the authority to award a dispositive preference.[58] The text of the Commission's decisions makes clear that the overriding objective of the pioneer's preference rules simply is to ensure the award of a license to an otherwise-qualified pioneer's preference recipient. Nowhere did the Commission suggest it wished to give the preference recipient a competitive edge over other licenses.[59] Indeed, in rejecting proposals to give preference recipients a formal headstart over other licensees, the Commission rejected such a goal.[60]

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[56] *Pioneer's Preference Report and Order*, 6 FCC Rcd at 3490, para. 19.

[57] *Id.* at 3492, para. 32 [emphasis supplied].

[58] *Id.* at para. 33. Upon reconsideration, the Commission affirmed that the preference will be dispositive. 7 FCC Rcd 1808, 1809 at para. 8. On further reconsideration, the Commission discussed at length its legal authority to award a dispositive preference. *See* 8 FCC Rcd 1659 (1993).

[59] *See* discussion at para. 1919, *infra*.

[60] *Pioneer's Preference Report and Order*, 6 FCC Rcd at 3492, para. 34:

We have recognized from the outset that pioneer's preference recipients may receive a *de facto* headstart because of the nature of our licensing process, but we specifically declined to provide a headstart beyond any such *de facto* headstart.[61]

17. In light of this background, the arguments of Page Net, and our further understanding of the auction process and the competitive effect of pioneer's preference recipients, particularly in narrowband PCS, receiving licenses for free, we are unable to determine that a grant of a license to Mtel without payment would serve the public interest, convenience, and necessity under Section 309 of the Act. As noted above, Mtel, if otherwise qualified, is entitled to the grant of the license under our pioneer's preference procedures. The pioneer's preference rules, however, were not intended to "reward" Mtel with an unfair competitive advantage in the position of narrowband PCS. If Mtel were to receive a license without paying anything[62] while other narrowband PCS providers were forced to pay substantial sums for their licenses, the Com-

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> We further have decided not to provide a headstart for the pioneering entity beyond the *de facto* headstart that may occur due to the time it may take other entities to apply for and receive a license. The commenting parties have convinced us that no additional headstart is necessary. As Southwestern Bell points out, the main effect of a headstart would be to give the pioneer a temporary service monopoly. As Southwestern Bell, Geller and Lampert, and others note, the key public interest benefit of a preference is the assurance to the pioneering entity that, if otherwise qualified, it will receive a license. For the Commission to go beyond this and guarantee the pioneer a temporary service monopoly would not appear to be justified at this time.
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> [footnote omitted.]

[61] *Pioneer's Preference Report and Order*, 6 FCC Rcd at 3492, para. 34.

[62] Pioneer's preference recipients must file the appropriate application along with the accompanying filing fee.

mission's licensing policies might have a significant adverse impact on the competitive marketplace.

18. The Commission has issued a number of orders relating to auctions since we decided that Mtel would not have to pay for its license, and we have developed a fuller understanding of the auction process as we have resolved various issues relating to the auctions. For example, in the *Competitive Bidding Second Report and Order*, we concluded that where licenses to be auctioned are interdependent and their value is expected to be high, the simultaneous multiple round auctions would best achieve our goals for competitive bidding and award interdependent licenses to the bidders who value them the most.[63] We later expressed our belief that the value of most narrowband PCS licenses will be significantly interdependent and we decided to group narrowband PCS licenses into various simultaneous auctions by aggregating together licenses exhibiting the greatest degree of interdependence and determined to auction the ten remaining nationwide narrowband PCS licenses in one group.[64] We further stated that

> the licenses are complements as well as substitutes, and thus their values are highly interdependent. They are complements because license aggregation enables bidders to realize certain economies of scale. . . . These licenses are also substitutes because, to varying degrees, they can be used as alternatives in the provision of the same or similar services.[65]

We now have a clearer understanding of the interdependence of the nationwide narrowband PCS licenses and the potential anticompetitive effects that the free award of

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[63] 9 FCC Rcd at 2367, paras. 109-111.

[64] *Competitive Bidding Third Report and Order* at paras. 18, 25 and 27.

[65] *Id.* at para. 27.

one of these licenses may have on the PCS market as well as the auction process.

19. As noted by PageNet, a pioneer's preference recipient who receives a free license would likely enter the competitive market with a significantly lower capital investment than the other licensees who bid and pay for their licenses. The difference would likely provide the pioneer's preference recipient with a substantial competitive advantage over its rivals, an advantage that we did not intend to confer when we adopted our pioneer's preference rules. In addition, the entire bidding process may be distorted by awarding a pioneer's preference recipient with a free license. Parties who might otherwise bid may be discouraged from bidding "top dollar" or from bidding at all because of their concerns over entering a new competitive market saddled with significantly greater capital costs that could place them at a competitive disadvantage. While we recognize that Mtel is (if otherwise qualified) entitled to a license grant under our pioneer's preference rules, we no longer can conclude that the equities weigh in favor of the grant of a free license to Mtel. In this regard, previously we overvalued such equities and undervalued the countervailing competitive concerns. Therefore, based upon the record before us in this proceeding and our increased understanding of the complex competitive issues in the narrowband PCS auction context, we cannot reach the conclusion that a grant to Mtel would serve the public interest, convenience, and necessity without requiring that Mtel pay for its license.[66] Accordingly, we will condition Mtel's grant on a payment requirement.

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[66] We note that Congressman Dingell recently introduced legislation that would amend Section 309(j)(6)(G) of the Communications Act, 47 U.S.C. § 309(j)(6)(G), to require that the Commission charge a pioneer's preference recipient 90% of the highest bid for a comparable license. *See* H.R. 4700, 103d Cong.,h) 2d Sess. (1994) ("Pioneer Preference Reform Act of 1994"). We recognize that this pending bill is not law and emphasize that our judgment on these issues is based on our own analysis and experience.

20. Having concluded that Mtel must pay for its license, we turn to a determination of the amount that Mtel must pay. We note that we are imposing more stringent buildout requirements on Mtel than on the other nationwide narrowband PCS licensees.[67] These additional build-out requirements may place Mtel at a competitive disadvantage because it will incur additional costs in meeting these requirements. We further note that the imposition of a payment requirement now, after our prior decision not to do so, may result in additional transaction costs for Mtel in seeking additional financing for or dedicating funds to the payment. Taking into account these new costs, we conclude that it is appropriate to grant Mtel a discount on its payment for the license even though we recognize the cost and competitive effect of the more-stringent build-out requirements that we are imposing and the likely transaction costs Mtel will incur. Accordingly, we will require Mtel to pay ninety (90) percent of the lowest winning bid for a nationwide narrowband PCS license or three million dollars ($3,000,000) less than the lowest winning bid for a nationwide narrowband PCS license, whichever is less.

21. Although we can not quantify the additional build-out and transaction costs or the countervailing competitive imbalance factor, we believe that, particularly in light of the inherent uncertainty involved in projecting the value of a license, a charge at these levels reasonably balances these factors. We recognize that the $3 million alternative might result in Mtel getting the license without payment or at minimal cost, depending on the value of the license as established by the auction. In the event that this scenario occurs, however, though, it would not undermine our purposes in requiring payment. Mtel would get the license without payment or at little cost (in recognition of its additional build-out and transaction costs) only if the value of the license itself were relatively small. If this

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[67] *See* para. 3942, *infra.*

scenario occurs, we believe that the relatively low auction prices will indicate that the price paid for the license at auction is not a significant portion of the total costs a narrowband PCS operator will incur, and the license granted without payment will not be an unfair competitive advantage for the preference winner.

22. We will condition the license upon Mtel making this payment within thirty (30) days after this Memorandum Opinion and Order, as well as the order granting its pioneer's preference, become final orders, that is, the orders are no longer subject to administrative reconsideration, or judicial review, appeal, or stay.

2. Authority to Require Payment

23. Our decision in this proceeding requires us to determine whether we have authority to condition Mtel's license on its payment of a charge. The question of our authority to require payment from pioneers was raised in the rulemaking notice that began our *Review of Pioneer's Preference Rules*;[68] but we did not resolve the question in that proceeding because our decision at that time was not to require payment for narrowband or broadband PCS preference winners.[69] Now that we have decided to require payment by Mtel, we must consider our authority to do so.

24. Section 309(j) of the Communications Act,[70] the source of our authority to select licensees by auction, applies only when the Commission has accepted "mutually exclusive applications" for licenses or construction permits. Mtel, by operation of our pioneer's preference rules, is the only entity eligible to apply for the license at issue, and there can be no mutually exclusive applications for

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[68] *Pioneer's Preference Review NPRM*, 8 FCC Rcd 7692, 7693, para. 10.

[69] *Id.* at 7694-5, para. 18. *Pioneer's Preference Review Report and Order*, 9 FCC Rcd at 610, para. 9.

[70] 47 U.S.C. § 309(j).

that license. Thus, we could not require Mtel to bid in an auction under Section 309(j) unless we amended our pioneer's preference rules to change the nature of the pioneer's preference award.[71]

25. Some parties at various stages of these proceedings have contended that Section 309(j) is the only source of authority for the Commission to assess a charge (other than a generally applicable fee) for a license, and that we have no choice but to grant Mtel's license without a condition requiring payment.[72] We disagree, and for the reasons that follow, we find such authority under Section 4(i),[73] in conjunction with Sections 1, 303(r), 307, 309, and 214,[74] of the Communications Act.

26. Section 4(i), which has been called the "necessary and proper clause" of the Communications Act,[75] authorizes the Commission to

> perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

We could not rely upon Section 4(i) to contravene an express prohibition or requirement of the Act, as the lan-

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[71] *See Pioneer's Preference Review NPRM.*

[72] *See, e.g., Narrowband Reconsideration*, 9 FCC Rcd 1315-16, para. 44.

[73] 47 U.S.C. § 154(i).

[74] 47 U.S.C. §§ 151, 303(r), 307, 309, 214(c).

[75] *See New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101, 1108 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989) (*quoting North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985)). The reference is to Article I, Section 8, Clause 18 of the Constitution, which authorizes Congress to make all laws that shall be "necessary and proper" for carrying out the enumerated powers "and all other powers" vested in the federal government.

guage of Section 4(i) itself makes clear. Thus, if any provision of the Act prohibited the Commission from imposing a charge on a pioneer's preference recipient, Section 4(i) would not be an independent basis for such authority. But no provision of the Act addresses this issue, either expressly or implicitly. Therefore, requiring Mtel to pay for its license in the circumstances of this case is "not inconsistent with the Act."[76] The remaining inquiry underLSection 4(i) is whether the action the Commission proposes to take "may be necessary in the execution of its functions." In application, Section 4(i) has been held to justify FCC orders that clearly were not within explicit grants of authority, where the orders rea-

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[76] *See North American Telecomm. Ass'n v. FCC*, 772 F.2d at 1292-93.

Assessing an auction-based charge is not contrary to the Supreme Court's decision in *National Cable Television Ass'n v. FCC*, 415 U.S. 336 (1974) (*NCTA*). In that case, as subsequently described, the Supreme Court struck down Commission fees that the Court perceived as an effort "to recover from regulated parties costs for benefits inuring to the public generally." *Skinner v. Mid-American Pipeline Co.*, 490 U.S. 212, 223-24 (1989) (*Skinner*). The Court in *NCTA* said that the only proper measure of the fee was "value to the recipient." 415 U.S. at 342-43, 344. In this instance, we do not seek to recover from Mtel (and, by extension, from other licensees who pay auction-based charges) "costs for benefits inuring to the public generally." *Skinner*, 490 U.S. at 224. Indeed, the "measure" of the charge for Mtel is precisely the one identified in *NCTA* as the only proper measure—the value of the license to the recipient. That value is determined by the auction price—the value that bidders are willing to pay—discounted for Mtel's special circumstances. *See* para. 2020, *supra*. This assessment thus does not raise concerns that the Commission may have used an incorrect standard in setting the charge. 415 U.S. at 343. Moreover, because the action the Commission takes here does not put it "in search of revenue in the manner of an Appropriation Committee of the House." *NCTA*, 415 U.S. at 341, no issue of impermissible delegation of taxing authority arises. *Id.* The charge here is determined directly by the auction process, and not by any concern for raising revenues "to recover administrative costs not inuring directly to the benefit of the parties. . . ." *Skinner*, 490 U.S. at 224.

sonably could be found to be "necessary and proper" for the execution of the agency's enumerated powers.

27. In *Nader v. FCC*,[77] for example, the court held that an FCC order prescribing a rate of return for AT&T "was in the public interest, necessary for the Commission to carry out its functions in an expeditious manner, and within its section 4(i) authority."[78] This was so even though the Communications Act gave the Commission express authority, in Section 205(a),[79] to prescribe "any charge, classification, regulation, or practice of any carrier . . . ," but did not mention any authority to prescribe a rate of return.

28. In *Lincoln Telephone & Telegraph Co. v. FCC*,[80] the court affirmed an order of the Commission requiring the telephone company, which was a "connecting carrier" within the meaning of the Act, to file tariffs with the FCC offering certain services. The order was upheld even though the only provision in the Act requiring carriers to file tariffs, Section 203(a),[81] specifically exempted connecting carriers from that requirement. The court held:

> Section 203(a)'s terms do not . . . in any way suggest that the section provides the exclusive authority under which the Commission can require a tariff to be filed. Thus, while Section 203(a) did not grant the Commission the requisite authority for its action. Section 154(i) did.[82]

29. In *North American Telecomm. Ass'n v. FCC*,[83] the Seventh Circuit affirmed an order requiring the Bell

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[77] 520 F.2d 182 (D.C. Cir. 1975).

[78] *Id.* at 204.

[79] 47 U.S.C. § 205.

[80] 659 F.2d 1092 (D.C. Cir. 1981) (*Lincoln Telephone*).

[81] 47 U.S.C. § 203(a).

[82] *Lincoln Telephone*, 659 F.2d at 1108-09.

[83] 772 F.2d 1282 (7th Cir. 1985) (*North American*).

holding companies to file capitalization plans for subsidiary companies organized to sell telephone equipment, even though the Act conferred no authority on the FCC over holding companies and the legislative history of the Act suggested that Congress had considered granting such authority but ultimately had denied it.[84] The court held that the Commission's authority to require the capitalization plans arose under "a separate grant of power" . . . Section 4(i).[85] The only real question, the court said, was

> whether the Commission could reasonably conclude that requiring the regional [holding] companies to submit plans of capitalization . . . was necessary and proper to the effectuation of the Commission's order requiring the separation of equipment sales from the companies' telephone operations].[86]

The court answered that question in the affirmative in holding that Section 4(i) authorized this action.

30. In *New England Telephone & Telegraph Co. v. FCC*,[87] the D.C. Circuit affirmed the Commission's order requiring AT&T (along with its former operating companies) to refund rates it had collected in excess of its authorized rate of return, rejecting the telephone companies' argument that the Commission's only statutory authority to require refunds, under Section 204(a)(1),[88] did not apply to their situation. Agreeing with the telephone companies that Section 204 "does not apply to the circumstances of this case,"[89] the court held that the Commission had "properly exercised its authority under

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[84] *Id.* at 1291-92.

[85] *Id.* at 1292.

[86] *Id.* at 1293.

[87] 826 F.2d 1101 (D.C. Cir. 1987) (*New England*).

[88] 47 U.S.C. § 204(a)(1).

[89] *New England*, 826 F.2d at 1107.

section 4(i) to remedy the violation" of its rate of return order.[90]

31. The court found that the Commission's choice of the refund remedy, "[i]n a strictly technical sense," was "absolutely necessary" to the effectuation of its rate of return prescription.[91] But it made clear that the Commission was not required to show that it had selected "the only conceivable [remedy in order to invoke its 4(i) powers."[92] It was enough that the action chosen by the agency "was appropriate and reasonable."[93]

32. The rule that emerges from these cases is that Section 4(i), although "not infinitely elastic,"[94] is a "wide ranging source of authority."[95]

> Section 4(i) empowers the Commission to deal with the unforeseen—even if that means straying a little way beyond the apparent boundaries of the Act—to the extent necessary to regulate effectively those matters already within the boundaries.[96]

If an action taken by the agency does not contravene another provision of the Act, it may be justified under Section 4(i) if the Commission "could reasonably conclude that [the action] was necessary and proper to the effectuation" of its functions.[97]

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[90] *Id.* at 1109.

[91] *Id.* at 1107-08.

[92] *Id.* at 1108.

[93] *Id.*

[94] *North American*, 772 F.2d at 1292.

[95] *New England*, 826 F.2d at 1109.

[96] *North American*, 772 F.2d at 1292. *See also U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968); *Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988); *FTC Communications, Inc. v. FCC*, 750 F.2d 226, 232 (2d Cir. 1984).

[97] *North American*, 772 F.2d at 1293.

33. Applying this rule to the circumstances of this case, we find authority under Section 4(i) to condition Mtel's license on the payment of an appropriate charge. First, requiring payment by Mtel is "necessary" if we are properly to carry out our public interest mandate in licensing PCS providers.[98] An important aspect of the public interest is promoting competition to the extent feasible and taking appropriate regulatory steps to ensure that the competition is fair.[99] Our development of PCS and of the pioneer's preference policies appropriately has emphasized competition at every step. Granting Mtel a license free of charge, we have found in this order, would likely give Mtel a significant competitive advantage over other licensees who would have to pay auction prices—a result that would not serve the public interest. We conclude that we have authority under Section 4(i) to condition Mtel's license on the payment of an amount based on the auction for other licenses in this service, in the execution of our responsibility to grant a license only if a grant would serve the public interest.

34. Second, requiring a payment by Mtel is "necessary and proper" in the execution of our function under Section 309(j) to implement a rational, fair system of competitive bidding. We have found elsewhere that the values of narrowband PCS licenses will be significantly interdependent. The prices a bidder might be willing to pay—or even the willingness to bid at all—might be affected in various ways by the fact that one license is available free to an applicant who will be competing with the auction winners. An award to Mtel free of charge thus might

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[98] *See* 47 U.S.C. §§ 307(a), 309(a), 214(a) and (c). *See also* 47 U.S.C. § 151.

[99] *See National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 636 and n.25 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976). *See also McLean Trucking Co. v. U.S.*, 321 U.S. 67, 86-88 (1944).

distort significantly the auction of other narrowband PCS licenses and, thereby, defeat or at least undermine some or all of the purposes of having the auction.[100] In this regard, we note that the auction statute itself does not limit our authority to require pioneer's preference recipients to pay for their licenses; it is neutral on this point.[101] We find that Section 4(i) authorizes us to condition Mtel's license on payment in order to effectuate our responsibility under Section 309(j) to design and conduct a rational and fair auction for narrowband PCS licenses.

35. Under the applicable statutes, the Commission may not grant a license or other instrument of authorization unless it can find (and does find) that a grant will serve the public interest, convenience, and necessity.[102] The D.C. Circuit has held that the Commission may grant a license "only when it would be in the public interest." [103] When necessary, the Commission may attach conditions to its grants of licenses so as to ensure that the grants will serve the public interest and to enforce those conditions.[104]

36. In this case we find that granting Mtel's license without a condition requiring payment would not be in the public interest because such a grant would create a competitive imbalance in PCS markets and because grant-

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[100] *See* PageNet Petition at 23-24.

[101] *See* 47 U.S.C. § 309(j)(6)(b); H.R. Rep. No. 111, 103d Cong., 1st Sess. 257 (1993).

[102] 47 U.S.C. §§ 307(a), 309(a), 214(a).

[103] *NAACP v. FCC*, 682 F.2d 993, 1003 (D.C. Cir. 1982).

[104] 47 U.S.C. §§ 303(r), 214(a). *See, e.g., P&R Temmer v. FCC*, 743 F.2d 918, 926-28 (D.C. Cir. 1984). *Cf. MCI Telecomm. Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (Commission may impose conditions on authorizations and enforce them only if it finds the conditions to be required by the public interest).

ing a free license regardless of its value would alter the competitive market and distort the statutory auction process. Where requiring payment by Mtel would track the auction procedure for awarding all other narrowband PCS licenses and would address our concerns about competition, we conclude that such a condition is "necessary and proper to the effectuation" of our functions.[105]

37. Mtel contends in its opposition to the petitions to deny that the question of payment was decided in earlier orders and need not be reconsidered now.[106] Mtel asserts that the Commission has no obligation to "re-litigate" issues it already has decided. Although we might not be required as a matter of law to revisit the payment issue in the context of Mtel's application, we clearly have authority to do so as part of our obligation to consider whether a grant would serve the public interest. This is particularly so when the issue of payment has been raised and argued vigorously in a petition to deny Mtel's license application.[107] Indeed, we do not understand Mtel's argument to suggest that we lack authority to revisit the matter.

38. In any event, when we first considered the issue, Mtel had only a pioneer's preference, not a license. The pioneer's preference award, moreover, guaranteed Mtel a license only if it could show in its application that it was otherwise qualified and that grant of the license would satisfy the statutory public interest standard. Our determination in this proceeding that grant of a license to Mtel without requiring payment would not serve the public interest clearly is a proper exercise of our licensing responsibility.

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[105] *North American*, 772 F.2d at 1293.

[106] Mtel Opposition at 13-14.

[107] *See* PageNet Petition at 18-24 (contending that grant of a license to Mtel without payment would not be in the public interest).

39. We recognize that our decision here to require payment by Mtel for its nationwide narrowband PCS license may be appealed and that our decision granting Mtel a pioneer's preference has been challenged in the D.C. Circuit. We also recognize that the overall public interest would best be served by resolving this matter expeditiously. Therefore, we will not require Mtel either to accept the license as conditioned or to file a written request rejecting the grant, which would result in the Commission setting the application for hearing pursuant to Section 1.110 of the Commission's rules.[108] Instead, the Commission will waive the requirements of Section 1.110 so that Mtel can seek judicial review immediately, unless Mtel indicates that it wishes to have its application set for hearing or accepts the license as granted. We reiterate that Mtel will not have to pay for its license until judicial review is completed.

3. Processing of Mtel's Application

40. We note that we have finalized the spectrum allocation and service rules for narrowband PCS,[109] and we conclude that Mtel's proposal is consistent with those regulations. In its application, Mtel submitted a public interest showing (Exhibit 1), a real party in interest and ownership disclosure (Exhibit 2), and a financial qualifications showing (Exhibit 3) consistent with our request in the February 3, 1994 Public Notice. In short, Mtel has demonstrated that it is qualified to be a Commission licensee. Petitioners have not shown any public interest reason why grant of Mtel's application must await the adoption of additional requirements and procedures in connection with narrowband PCS auction applications.[110]

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[108] 47 C.F.R. § 1.110.

[109] *See Narrowband Reconsideration*, 9 FCC Rcd 1309 (1994).

[110] In any event, these additional rules were recently adopted and do not affect Mtel. *See Competitive Bidding Third Report and*

In addition, interested parties have had the full opportunity to show why, in their view, the grant is not in the public interest or raises substantial and material questions of fact under Section 309(d) of the Act. Petitioners have taken advantage of this opportunity. The record before us supplies the necessary information to determine that Mtel is legally, technically, and financially qualified and that grant of its application serves the public interest.[111]

4. Requirement to Build Proposed System

41. Questions regarding the system that Mtel will build have already been resolved by the Commission in the *Narrowband Reconsideration:*

> . . . we will direct the licensing bureau to condition any license granted Mtel based on its preference upon Mtel building a system that substantially uses the design and technologies upon which its preference award is based. This condition will apply only for the nationwide channel for which the preference is being granted and only until it has met the initial five year build-out requirement in the rules.[112]

Order. Specifically, the Commission adopted competitive bidding procedure rules (47 C.F.R. §§ 24.301-24.309) and interim application, licensing, and processing rules (47 C.F.R. §§ 24.403-24.444). These rules became effective on June 23, 1994. *See* 59 Fed. Reg. 26,741 (May 24, 1994). We find that Mtel has complied with our application filing requirements for narrowband PCS adopted in the *Competitive Bidding Third Report and Order* and no amendment to its application is required by these rules.

[111] We note that PageNet asserts that the Commission, in inviting Mtel's application, has violated the Paperwork Reduction Act of 1980 (44 U.S.C. § 3501 *et seq.*) (PRA). PageNet Petition at 10; PageNet Reply at 10-11. The requirement to submit information requests for approval to the Office of Management and Budget applies only when the information is collected from ten or more persons. *See* 44 U.S.C. § 3502(4)(A). Only one person was invited to file an application and the information collection, therefore, is not within the ambit of the PRA.

[112] 9 FCC Rcd at 1316, para. 47.

Petitioners allege that Mtel will not use the specific technologies for which it was awarded a pioneer's preference. The BellSouth Companies argue that, while Mtel relied on two specific multi-carrier modulation (MCM) techniques in winning its preference, Mtel's application simply states that it will use MCM without any detailed description.[113] PageNet asserts that Mtel's application demonstrates that it will not meet the requirements to build a system that substantially uses its pioneer's preference design and technology.[114] We find that Petitioner's arguments fail to raise any substantial and material questions of fact suggesting that Mtel does not intend to comply with the substantial use requirement. Mtel has stated that it will substantially use the design and technologies

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[113] BellSouth Companies Petition at 8-10. The BellSouth Companies support this argument with a Declaration of Dr. Alain Brian'on who states that the lack of specificity in Mtel's application is significant because a number of MCM techniques are under development by other companies. Brian'on Declaration at 3. The gravamen of Dr. Brian'on's Declaration is his opinion that

> Mtel has not supplied sufficient information in the NWN Application of February 10 to determine whether the system it proposes will substantially use the design and technology upon which it was granted a pioneer's preference.

Id. at 1. *See also* BellSouth Companies Reply at 4-11.

[114] PageNet Petition at 2. PageNet asserts that Mtel has not specifically declared that it will use the Mary MCM technology upon which its pioneer's preference award is based. PageNet argues for the insertion of two conditions in Mtel's license requiring the use of specific technologies and revocation of the license or payment at the highest auction price bid for a 50 kHz nationwide channel should Mtel not build the specific system. In addition, PageNet argues that the Commission should require that Mtel, four months prior to operation of the system, describe the system in substantial detail; certify and state in detail how, if at all, the system differs from the design and technology on which the pioneer's preference is based; and address whether such differences are substantial. PageNet contends that this information should be placed on Public Notice and interested parties should be given an opportunity to comment. PageNet Petition at 2-6. *See also* PageNet Reply at 2-6.

upon which its preference award is based.[115] Accordingly, we will condition Mtel's license to require it to build a system that substantially uses the design and technologies on which its pioneer's preference is based. The Commission has available to it the full range of sanctions, including, for example, forfeiture, license revocation, or non-renewal, if Mtel fails to comply with this or any other condition of its license.

5. Additional Conditions on Mtel's Grant

42. We requested comment on whether to impose additional, more stringent build-out conditions on Mtel's grant. Mtel has stated that, in the interest of expediting its grant, it agrees to accept a condition requiring Mtel to cover 90 percent of the population nationwide within 10 years after grant of its license.[116] The BellSouth Companies, however, ask us to impose even more stringent build-out requirements on Mtel.[117] We find that the conditions proposed by the BellSouth Companies are unnecessarily stringent and go well beyond our public interest requirements. A build-out of this nature does not appear to be necessary to ensure that Mtel will provide broad service to the public in a large number of localities and communities throughout the nation.[118] Nor is it clear that there will be unmet demand necessitating the requirements suggested by the BellSouth Companies. Accordingly, we will condition Mtel's license on compliance with a stricter build-out requirement than that set forth in the *Narrowband Reconsideration*. Mtel must cover 90 percent of the population at the 10-year mark. We reiterate that we will readdress, if necessary, our narrowband PCS construction requirements in the future if we find that

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[115] *See Narrowband Reconsideration*, 9 FCC Rcd at 1316, para. 47.

[116] Mtel Application at Exhibit 1, page 7.

[117] *See* discussion at para. 1010, *supra*.

[118] *See Narrowband Reconsideration*, 9 FCC Rcd at 1316, n.26.

demand for narrowband PCS services is not being met in all areas.[119]

6. Mtel/Microsoft, Real Party in Interest and Ownership

43. As indicated in the *Narrowband Reconsideration*, the Commission will condition the grant of a license to Mtel on its holding the license for a minimum of three years or until the construction requirement applicable to the five-year build-out period has been satisfied, whichever occurs first,[120] a condition Mtel has accepted.

44. We have reviewed the filing that Mtel made with regard to the investment by Microsoft and others. While Mtel states that it has entered into agreements with prospective investors on March 23, 1994, those agreements have not been submitted to us because Mtel is not seeking to implement the agreements at this time. Accordingly, we decline, at this time, to reach the issue of whether the proposed investments in NWN Corp. will result in a transfer of control. We note that Mtel may file a petition for declaratory ruling requesting that the Commission find that prior approval is not required on the grounds that the transaction does not involve a transfer of control under Section 310(d) of the Act.[121] Mtel, of course, is under no obligation to seek such a declaratory ruling and may proceed at its own risk. We note that, should a transfer of control take place without prior Commission approval, Mtel could be subject to a revocation of its license under Section 312 of the Act[122] and forfeiture under Section 503(b) of the Act.[123]

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[119] *Id.*, 9 FCC Rcd at 1314, para. 34.

[120] *Id.*, 9 FCC Rcd at 1316, para. 48.

[121] 47 U.S.C. § 310(d). *See, e.g.*, McCaw Cellular Communications Inc., 4 FCC Rcd 3784 (Com. Car. Bur. 1989).

[122] 47 U.S.C. § 312.

[123] 47 U.S.C. § 503(b).

45. We are satisfied that Mtel has complied with Section 310(b) of the Act concerning alien ownership restrictions. Mtel has conducted a survey and represents that it is in compliance with the alien ownership restrictions.[124] Petitioners have raised no substantial or material questions of fact with regard to the veracity of Mtel's compliance with the alien ownership restrictions.

46. Finally, contrary to the BellSouth Companies' assertions, we note that Mtel is the real party in interest here and has explained the discrepancy in the filing chronology and the name of the applicant. The allegation made by the BellSouth Companies in their Reply that two different subsidiaries of Mtel have been represented to the Commission as the applicant is unsupported by the facts. On March 25, 1994, Mtel properly amended its application to indicate the name change of the applicant from NWN Corporation to Nationwide Wireless Network Corporation and then further amended the application to specify that the corporation records abbreviate "Corporation" as "Corp." Mtel has satisfactorily explained this discrepancy. The BellSouth Companies' allegations do not raise a substantial or material question of fact regarding the identity of the applicant, the real party in interest, or Mtel's qualifications to be a licensee.

IV. CONCLUSION

47. Having reviewed the application and the pleadings filed in this matter, we conclude that, as conditioned here, grant of the subject application for the first commercial nationwide narrowband PCS license will serve the public interest, convenience, and necessity, and that none

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[124] *See, e.g.*, Riverside Broadcasting Co., Inc., 53 RR 2d 1154 (1983) (survey accepted to show compliance with alien ownership restrictions), *recon. denied*, 56 RR 2d (1984), *reversed and remanded on other grounds, Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392 (D.C. Cir. 1985), *recon. denied*, 104 F.C.C. 2d 644 (1986).

of the petitioners raises any substantial or material question as to Mtel's qualifications to be a Commission licensee.

V. ORDERING CLAUSES

48. Accordingly, IT IS ORDERED that the Petitions to Deny filed by BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corporation, and Mobile Communications Corporation of America IS DENIED and the Petition to Deny filed by Paging Network, Inc. IS DENIED IN PART AND GRANTED IN PART.

49. IT IS FURTHER ORDERED that the request made by Mtel that its Response filed on April 26, 1994 be accepted as part of the record of this proceeding IS GRANTED and that the Reply to Mtel "Response" filed by the BellSouth Companies on May 6, 1994 IS ACCEPTED FOR FILING.

50. IT IS FURTHER ORDERED that the application of Nationwide Wireless Network Corp. (File No. 22888-CD-P/L-94) IS GRANTED, subject to the following conditions:

> 1. This authorization requires that Nationwide Wireless Network Corp. (d/b/a NWN Corp.) shall construct a nationwide 50 kHz narrowband Personal Communications Services system that substantially uses the design and technology upon which the pioneer's preference award to Mobile Telecommunication Technologies Corporation was based. This condition expires upon meeting the five-year build-out requirement in 47 C.F.R. § 24.103(a);
>
> 2. This authorization requires that Nationwide Wireless Network Corp. (d/b/a NWN Corp.) shall retain control of the license for at least three years from the initial license grant date or until the grantee has met the five-year build-out requirement of 47 C.F.R. § 24.103(a) (construction of base stations

that provide coverage to a composite area of 750,000 square kilometers or serve 37.5 percent of the U.S. population), whichever occurs first;

3. Notwithstanding the requirement of 47 C.F.R. § 24.103(a), this authorization requires that Nationwide Wireless Network Corp. (d/b/a NWN Corp.) construct base stations that serve 90 percent of the U.S. population within 10 years of initial license grant date;

4. This authorization requires that Nationwide Wireless Network Corp. (d/b/a NWN Corp.) shall pay to the United States Treasury an amount equal to ninety (90) percent of the lowest winning bid for a nationwide narrowband PCS license or three million dollars ($3,000,000) less than the lowest winning bid for a nationwide narrowband PCS license, whichever is less, thirty (30) days after this Memorandum Opinion and Order and the order granting Mtel a pioneer's preference become final orders, that is, the orders are no longer subject to administrative reconsideration or judicial review, appeal, or stay.

51. IT IS FURTHER ORDERED that Section 1.110 of the Commission's rules, 47 C.F.R. § 1.110, IS WAIVED, unless Mtel requests a hearing within thirty (30) days of the release of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

RE: Nationwide Wireless Network Corp.
Mtel Narrowband PCS License

Because I have consistently contended that pioneer's preference grantees were never intended to take their spectrum for free in a post-auction world, it may seem curious that I am not giving my unqualified support to a Commission decision that endorses that principle. Two aspects of today's decision, however, trouble me.

The first is the prospect that, as the decision candidly admits, Mtel could in fact wind up paying nothing for its spectrum if the spectrum's auction value turns out to be $3 million or less. To me, this result is inconsistent with the basic reason for having auctions, which is to capture the value of spectrum for the public. Even at an unexpectedly low auction price, no one could plausibly argue that narrowband PCS spectrum would have no value for Mtel. For this reason, I cannot endorse a payment plan that could allow Mtel, or any pioneer's preference holder, to take its spectrum for free. I do believe, however, that the current pre-auction estimates of the value of narrowband PCS spectrum are more likely to be too low rather than too high, and therefore Mtel will ultimately make a substantial payment for its spectrum. On this basis, and this basis alone, I can concur with this aspect of the Commission's decision.

The other facet of today's decision that I find problematic is our statutory basis for imposing this payment requirement on Mtel. Our legal analysis, although plausible, certainly entails what may best be described as an aggressive interpretation of Section 4(i) of the Communications Act. Should this decision be appealed, I trust that the reviewing court will agree with our interpretation in light of the case law we cite—but it would be unrealistic to suggest that reviewing courts are lately in the habit of

extending us this sort of benefit of the doubt. And if for any reason today's decision does not stand, with the result that we are unable to require payment from pioneer's preference holders, I for one would seriously question whether we should grant such preferences in the future.

SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS

Re: *Award of Narrowband PCS License to Mtel Corporation*

Today we award a narrowband PCS license to Mtel but impose a payment obligation upon the license. This decision reflects a careful balancing of competing interests and a conscientious effort to meet our statutory obligation to serve the public interest, convenience, and necessity.

This is the first substantive Commission decision involving pioneer's preferences in which I have participated. Although the creation of the pioneer's preference program and the decision to award a pioneer's preference to Mtel both predated my arrival, I have thought it important for the Commission to maintain a sense of continuity. For this reason, I firmly support the issuance of a license to Mtel, one which grants it the recognition and the opportunity to participate in the narrowband PCS market that was promised.

Yet our public interest responsibilities also require that other factors be considered. Subsequent to the award of a final pioneer's preference to Mtel, Congress enacted legislation which requires that competitive bidding be used to resolve mutually exclusive license applications for services such as narrowband PCS. As a consequence of the Commission's earlier ruling, Mtel's application is not subject to mutually exclusive applications, but we cannot ignore the adverse consequences that could result from awarding one of several licenses without payment while requiring that other parties pay what could be substantial sums for their licenses.

As I reviewed the circumstances and the history of legislative and administrative actions in this area, I reached several conclusions. First, enactment of the auction legislation fundamentally altered the sigificance of the pioneer's preference grant and the potential relation-

ship among competitors in the narrowband PCS market. Second, there was nothing in the legislation or its legislative history to suggest that the Congress intended to create substantial competitive disparities between successful bidders and recipients of pioneer's preferences. Third, the adverse competitive effects of awarding a single party a license without payment increase as the value of the license itself increases. Fourth, complete exemption from a payment obligation could result in a pioneer being unjustly enriched by Commission action bestowing valuable rights which may be arbitrarily disproportionate to any public benefits resulting from efforts undertaken in response to the inducement of the pioneer's preference program. Fifth, the Commission has not only the authority but also the duty to determine whether a pioneer's preference license should be awarded unconditionally or subject to conditions.

From these premises, and the totality of circumstances, I believe our decision to impose a payment requirement (along with other requirements set forth in the order) is necessary to meet our public interest responsibility. I further conclude that it is essential to structure the payment condition in a manner which provides for competitive balance in the narrowband PCS market, avoids giving any party what could be an insurmountable advantage over those who obtain their licenses through the auction process, minimizes the prospect of unjust enrichment, and otherwise deals responsibly with the disposition of a valuable public resource.

The structure of our payment requirement, with elements of absolute discount and percentage discount, holds out the possibility that Mtel will secure its license without payment if the market value of that license, as determined by the auction of other narrowband PCS licenses, is $3 million or less. If the value of the license is greater, between $3 and $30 million, Mtel will still enjoy a significant discount from the market price. Even if the value of the license proves to be in excess of $30 million, Mtel

will reap the reward of a 10 percent discount. This approach reflects the shifting balance of equities in the complex circumstances of this unique case.

I believe the approach we adopt today resolves the issues in a manner which is fair to all parties, fosters the rapid development of a robust competition in the narrowband PCS market, and comports with our statutory mandate.

APPENDIX C

[Filed May 8, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1552

MOBILE TELECOMMUNICATIONS TECHNOLOGIES CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

And Consolidated Case

BEFORE: Edwards, Chief Judge, Buckley and Williams, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed April 22, 1996, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

[Filed May 8, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1552

MOBILE TELECOMMUNICATIONS TECHNOLOGIES CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

And Consolidated Case

BEFORE: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, and Tatel, Circuit Judges

ORDER

Upon consideration of appellants' Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the Court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judges Henderson and Randolph did not participate in this order.

APPENDIX D

[Filed May 22, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1552

MOBILE TELECOMMUNICATIONS TECHNOLOGIES CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

and Consolidated Case No. 94-1553

BEFORE: Edwards, Chief Judge, Buckley and Williams, Circuit Judges

ORDER

Upon consideration of appellants' motion for stay of mandate, it is

ORDERED that the motion is granted. The Clerk is directed to withhold issuance of the court's mandate for a period of thirty days from the date of this order.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS

UNITED STATES CODE

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5—WIRE OR RADIO COMMUNICATION

SUBCHAPTER I—GENERAL PROVISIONS

§ 158. Application fees

(a) Assessment and collection; Schedule of Application Fees

The Commission shall assess and collect application fees at such rates as the Commission shall establish or at such modified rates as it shall establish pursuant to the provisions of subsection (b) of this section.

(b) Review and adjustment of Schedule by Commission; notification to Congress; judicial review

(1) The Schedule of Application Fees established under this section shall be reviewed by the Commission every two years after October 1, 1991 and adjusted by the Commission to reflect changes in the Consumer Price Index. Increases or decreases in application fees shall apply to all categories of application fees, except that individual fees shall not be adjusted until the increase or decrease, as determined by the net change in the Consumer Price Index since April 7, 1986, amounts to at least $5.00 in the case of fees under $100.00, or 5 percent in the case of fees of $100.00 or more. All fees which require adjustment will be rounded upward to the next $5.00 increment. The Commission shall transmit to the Congress notification of any such adjustment not later than 90 days before the effective date of such adjustment.

(2) Increases or decreases in application fees made pursuant to this subsection shall not be subject to judicial review.

(c) Additional application fee; assessment as penalty; amount; dismissal of application or other filing

(1) The Commission shall prescribe by regulation an additional application fee which shall be assessed as a penalty for late payment of application fees required by subsection (a) of this section. Such penalty shall be 25 percent of the amount of the application fee which was not paid in a timely manner.

(2) The Commission may dismiss any application or other filing for failure to pay in a timely manner any application fee or penalty under this section.

(d) Inapplicability of application fees to certain radio services; waiver or deferment of payment

(1) The application fees established under this section shall not be applicable (A) to governmental entities and non-profit entities licensed in the following radio services: Local Government, Police, Fire, Highway Maintenance, Forestry-Conservation, Public Safety, and Special Emergency Radio, or (B) to governmental entities licensed in other services.

(2) The Commission may waive or defer payment of an charge in any specific instance for good cause shown, where such action would promote the public interest.

(e) Deposit of moneys in general fund; reimbursement of United States for administration of chapter

Moneys received from application fees established under this section shall be deposited in the general fund of the Treasury to reimburse the United States for amounts appropriated for use by the Commission in carrying out its functions under this chapter.

(f) Rules and regulations

The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

(g) Schedule of Application Fees

Until modified pursuant to subsection (b) of this section, the Schedule of Application Fees which the Federal Communications Commission shall prescribe pursuant to subsection (a) of this section shall be as follows:

SCHEDULE OF APPLICATION FEES

Service	Fee amount
PRIVATE RADIO SERVICES	
1. Marine Coast Stations	
a. New License (per station)	$70.00
b. Modification of License (per station)	70.00
c. Renewal of License (per station)	70.00
d. Special Temporary Authority (Initial, Modifications, Extensions)	100.00
e. Assignments (per station)	70.00
f. Transfers of Control (per station)	35.00
g. Request for Waiver	
(i) Routine (per request)	105.00
(ii) Non-Routine (per rule section/per station)	105.00
2. Ship Stations	
a. New License (per application)	35.00
b. Modification of License (per application)	35.00
c. Renewal of License (per application)	35.00
d. Request for Waiver	
(i) Routine (per request)	105.00
(ii) Non-Routine (per rule section/per station)	105.00
3. Operational Fixed Microwave Stations	
a. New License (per station)	155.00
b. Modification of License (per station)	155.00
c. Renewal of License (per station)	155.00
d. Special Temporary Authority (Initial, Modifications, Extensions)	35.00

Service	Fee amount
e. Assignments (per station)	155.00
f. Transfers of Control (per station)	35.00
g. Request for Waiver	
(i) Routine (per request)	105.00
(ii) Non-Routine (per rule section/per station)	105.00
4. Aviation (Ground Stations)	
a. New License (per station)	70.00
b. Modification of License (per station)	70.00
c. Renewal of License (per station)	70.00
d. Special Temporary Authority (Initial, Modifications, Extensions)	100.00
e. Assignments (per station)	70.00
f. Transfers of Control (per station)	35.00
g. Request for Waiver	
(i) Routine (per request)	105.00
(ii) Non-Routine (per rule section/per station)	105.00
5. Aircraft Stations	
a. New License (per application)	35.00
b. Modification of License (per application)	35.00
c. Renewal of License (per application)	35.00
d. Request for Waiver	
(i) Routine (per request)	105.00
(ii) Non-Routine (per rule section/per station)	105.00

* * * *

UNITED STATES CODE

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5—WIRE OR RADIO COMMUNICATION

SUBCHAPTER I—GENERAL PROVISIONS

§ 159. Regulatory fees

(a) General authority

(1) Recovery of costs

The Commission, in accordance with this section, shall assess and collect regulatory fees to recover the costs of the following regulatory activities of the Commission: enforcement activities, policy and rulemaking activities, user information services, and international activities.

(2) Fees contingent on appropriations

The fees described in paragraph (1) of this subsection shall be collected only if, and only in the total amounts, required in Appropriations Acts.

(b) Establishment and adjustment of regulatory fees

(1) In general

The fees assessed under subsection (a) of this section shall—

(A) be derived by determining the full-time equivalent number of employees performing the activities described in subsection (a) of this section within the Private Radio Bureau, Mass Media Bureau, Common Carrier Bureau, and other offices of the Commission, adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities, including such factors as service area coverage, shared use versus exclusive use, and other factors that the Commission determines are necessary in the public interest;

(B) be established at amounts that will result in collection, during each fiscal year, of an amount that can reasonably be expected to equal the amount appropriated for such fiscal year for the performance of the activities described in subsection (a) of this section; and

(C) until adjusted or amended by the Commission pursuant to paragraph (2) or (3), be the fees established by the Schedule of Regulatory Fees in subsection (g) of this section.

(2) Mandatory adjustment of schedule

For any fiscal year after fiscal year 1994, the Commission shall, by rule, revise the Schedule of Regulatory Fees by proportionate increases or decreases to reflect, in accordance with paragraph (1)(B), changes in the amount appropriated for the performance of the activities described in subsection (a) of this section for such fiscal year. Such proportionate increases or decreases shall—

(A) be adjusted to reflect, within the overall amounts described in appropriations Acts under the authority of paragraph (1)(A), unexpected increases or decreases in the number of licensees or units subject to payment of such fees; and

(B) be established at amounts that will result in collection of an aggregate amount of fees pursuant to this section that can reasonably be expected to equal the aggregate amount of fees that are required to be collected by appropriations Acts pursuant to paragraph (1)(B).

Increases or decreases in fees made by adjustments pursuant to this paragraph shall not be subject to judicial review. In making adjustments pursuant to this paragraph the Commission may round such fees to the nearest $5 in the case of fees under $1,000, or to the nearest $25 in the case of fees of $1,000 or more.

(3) Permitted amendments

In addition to the adjustments required by paragraph (2), the Commission shall, by regulation, amend the

Schedule of Regulatory Fees if the Commission determines that the Schedule requires amendment to comply with the requirements of paragraph (1)(A). In making such amendments, the Commission shall add, delete, or reclassify services in the Schedule to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law. Increases or decreases in fees made by amendments pursuant to this paragraph shall not be subject to judicial review.

(4) Notice to Congress

The Commission shall—

(A) transmit to the Congress notification of any adjustment made pursuant to paragraph (2) immediately upon the adoption of such adjustment; and

(B) transmit to the Congress notification of any amendment made pursuant to paragraph (3) not later than 90 days before the effective date of such amendment.

(c) Enforcement

(1) Penalties for late payment

The Commission shall prescribe by regulation an additional charge which shall be assessed as a penalty for late payment of fees required by subsection (a) of this section. Such penalty shall be 25 percent of the amount of the fee which was not paid in a timely manner.

(2) Dismissal of applications for filings

The Commission may dismiss any application or other filing for failure to pay in a timely manner any fee or penalty under this section.

(3) Revocations

In addition to or in lieu of the penalties and dismissals authorized by paragraphs (1) and (2), the Commission

may revoke any instrument of authorization held by any entity that has failed to make payment of a regulatory fee assessed pursuant to this section. Such revocation action may be taken by the Commission after notice of the Commission's intent to take such action is sent to the licensee by registered mail, return receipt requested, at the licensee's last known address. This notice will provide the licensee at least 30 days to either pay the fee or show cause why the fee does not apply to the licensee or should otherwise be waived or payment deferred. A hearing is not required under this subsection unless the licensee's response presents a substantial and material question of fact. In any case where a hearing is conducted pursuant to this section, the hearing shall be based on written evidence only, and the burden of proceeding with the introduction of evidence and the burden of proof shall be on the licensee. Unless the licensee substantially prevails in the hearing, the Commission may assess the licensee for the costs of such hearing. Any Commission order adopted pursuant to this subsection shall determine the amount due, if any, and provide the licensee with at least 30 days to pay that amount or have its authorization revoked. No order of revocation under this subsection shall become final until the licensee has exhausted its right to judicial review of such order under section 402(b)(5) of this title.

(d) Waiver, reduction, and deferment

The Commission may waive, reduce, or defer payment of a fee in any specific instance for good cause shown, where such action would promote the public interest.

(e) Deposit of collections

Moneys received from fees established under this section shall be deposited as an offsetting collection in, and credited to, the account providing appropriations to carry out the functions of the Commission.

(f) Regulations

(1) In general

The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

(2) Installment payments

Such rules and regulations shall permit payment by installments in the case of fees in large amounts, and in the case of fees in small amounts, shall require the payment of the fee in advance for a number of years not to exceed the term of the license held by the payor.

(g) Schedule

Until amended by the Commission pursuant to subsection (b) of this section, the Schedule of Regulatory Fees which the Federal Communications Commission shall, subject to subsection (a)(2) of this section, assess and collect shall be as follows:

SCHEDULE OF REGULATORY FEES

Bureau/Category	Annual Regulatory Fee
Private Radio Bureau	
Exclusive use services (per license)	
Land Mobile (above 470 MHz, Base Station and SMRS) (47 C.F.R. Part 90)	$16
Microwave (47 C.F.R. Part 94)	16
Interactive Video Data Service (47 C.F.R. Part 95)	16
Shared use services (per license unless otherwise noted)	7
Amateur vanity call-signs	7
Mass Media Bureau (per license)	
AM radio (47 C.F.R. Part 73)	
Class D Daytime	250
Class A Fulltime	900
Class B Fulltime	500
Class C Fulltime	200
Construction permits	100

Bureau/Category	Annual Regulatory Fee
FM radio (47 C.F.R. Part 73)	
Classes C, C1, C2, B	900
Classes A, B1, C3	600
Construction permits	500
TV (47 C.F.R. Part 73)	
VHF Commercial	
Markets 1 thru 10	18,000
Markets 11 thru 25	16,000
Markets 26 thru 50	12,000
Markets 51 thru 100	8,000
Remaining Markets	5,000
Construction permits	4,000
UHF Commercial	
Markets 1 thru 10	14,400
Markets 11 thru 25	12,800
Markets 26 thru 50	9,600
Markets 51 thru 100	6,400
Remaining Markets	4,000
Construction permits	3,200
Low Power TV, TV Translator, and TV Booster (47 C.F.R. Part 74)	135
Broadcast Auxiliary (47 C.F.R. Part 74)	25
International (HF) Broadcast (47 C.F.R. Part 73)	200
Cable Antenna Relay Service (47 C.F.R. Part 78)	220
Cable Television System (per 1,000 subscribers) (47 C.F.R. Part 76)	370
Common Carrier Bureau	
Radio Facilities	
Cellular Radio (per 1,000 subscribers) (47 C.F.R. Part 22)	60
Personal Communications (per 1,000 subscribers) (47 C.F.R.)	60
Space Station (per operational station in geosynchronous orbit) (47 C.F.R. Part 25)	65,000
Space Station (per system in low-earth orbit) (47 C.F.R. Part 25)	90,000
Public Mobile (per 1,000 subscribers) (47 C.F.R. Part 22)	60
Domestic Public Fixed (per call sign) (47 C.F.R. Part 21)	55
International Public Fixed (per call sign) (47 C.F.R. Part 23)	110

Bureau/Category	Annual Regulatory Fee
Earth Stations (47 C.F.R. Part 25)	
VSAT and equivalent C-Band antennas (per 100 antennas)	6
Mobile satellite earth stations (per 100 antennas)	6
Earth station antennas	
Less than 9 meters (per 100 antennas)	6
9 Meters or more	
Transmit/Receive and Transmit Only (per meter)	85
Receive only (per meter)	55
Carriers	
Inter-Exchange Carrier (per 1,000 presubscribed access lines)	60
Local Exchange Carrier (per 1,000 access lines)	60
Competitive access provider (per 1,000 subscribers)	60
International circuits (per 100 active 64KB circuit or equivalent)	220

(h) Exceptions

The charges established under this section shall not be applicable to (1) governmental entities or nonprofit entities; or (2) to amateur radio operator licenses under part 97 of the Commission's regulations (47 C.F.R. Part 97).

(i) Accounting system

The Commission shall develop accounting systems necessary to making the adjustments authorized by subsection (b)(3) of this section. In the Commission's annual report, the Commission shall prepare an analysis of its progress in developing such systems and shall afford interested persons the opportunity to submit comments concerning the allocation of the costs of performing the functions described in subsection (a) of this section among the services in the Schedule.

UNITED STATES CODE

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5—WIRE OR RADIO COMMUNICATION

SUBCHAPTER III—SPECIAL PROVISIONS RELATING TO RADIO

PART I—GENERAL PROVISIONS

§ 309. Application for license

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * * *

(j) Use of competitive bidding

(1) General authority

If mutually exclusive applications are accepted for filing for any initial license or construction permit which will involve a use of the electromagnetic spectrum described in paragraph (2), then the Commission shall have the authority, subject to paragraph (10), to grant such license or permit to a qualified applicant through the use of a system of competitive bidding that meets the requirements of this subsection.

(2) Uses to which bidding may apply

A use of the electromagnetic spectrum is described in this paragraph if the Commission determines that—

(A) the principal use of such spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers in return for which the licensee—

(i) enables those subscribers to receive communications signals that are transmitted utilizing frequencies on which the licensee is licensed to operate; or

(ii) enables those subscribers to transmit directly communications signals utilizing frequencies on which the licensee is licensed to operate; and

(B) a system of competitive bidding will promote the objectives described in paragraph (3).

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and

(D) efficient and intensive use of the electromagnetic spectrum.

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall—

(A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

(B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;

(C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic

opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures; and

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits.

(5) Bidder and licensee qualification

No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing. No license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) of this section and sections 308(b) and 310 of this title. Consistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) of this section for the resolution of any substantial and material issues of fact concerning qualifications.

(6) Rules of construction

Nothing in this subsection, or in the use of competitive bidding, shall—

(A) alter spectrum allocation criteria and procedures established by the other provisions of this chapter;

(B) limit or otherwise affect the requirements of subsection (h) of this section, section 301, 304, 307, 310, or 606 of this title, or any other provision of this chapter (other than subsections (d)(2) and (e) of this section);

(C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses;

(D) be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection;

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;

(F) be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits;

(G) be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunciations service or technology; or

(H) be construed to relieve any applicant for a license or permit of the obligation to pay charges imposed pursuant to section 158 of this title.

(7) Consideration of revenues in public interest determinations

(A) Consideration prohibited

In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited

In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(C) Consideration of demand for spectrum not affected

Nothing in this paragraph shall be construed to prevent the Commission from continuing to consider consumer demand for spectrum-based services.

(8) Treatment of revenues

(A) General rule

Except as provided in subparagraph (B), all proceeds from the use of a competitive bidding system under this subsection shall be deposited in the Treasury in accordance with chapter 33 of Title 31.

(A) Retention of revenues

Nothwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain

as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this subsection. Such offsetting collections shall be available for obligation subject to the terms and condiitons of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis. Any funds appropriated to the Commission for fiscal years 1994 through 1998 for the purpose of assigning licenses using random selection under subsection (i) of this section shall be used by the Commission to implement this subsection. Such offsetting collections are authorized to remain available until expended.

(C) Deposit and use of auction escrow accounts

Any deposits the Commission may require for the qualification of any person to bid in a system of competitive bidding pursuant to this subsection shall be deposited in an interest bearing account at a financial institution designated for purposes of this subsection by the Commission (after consultation with the Secretary of the Treasury). Within 45 days following the conclusion of the competitive bidding—

(i) the deposits of successful bidders shall be paid to the Treasury;

(ii) the deposits of unsuccessful bidders shall be returned to such bidders; and

(iii) the interest accrued to the account shall be transferred to the Telecommunications Development Fund established pursuant to section 614 of this title.

(9) Use of former government spectrum

The Commission shall, not later than 5 years after August 10, 1993, issue licenses and permits pursuant to this subsection for the use of bands of frequencies that—

(A) in the aggregate span not less than 10 megahertz; and

(B) have been reassigned from Government use pursuant to part B of the National Telecommunications and Information Administration Organization Act [47 U.S.C.A. § 921 et. seq.].

(10) Authority contingent on availability of additional spectrum

(A) Initial conditions

The Commission's authority to issue licenses or permits under this subsection shall not take effect unless—

(i) the Secretary of Commerce has submitted to the Commission the report required by section 113(d)(1) of the National Telecommunications and Information Administration Organization Act [47 U.S.C.A. § 923(d)(1)];

(ii) such report recommends for immediate reallocation bands of frequencies that, in the aggregate, span not less than 50 megahertz;

(iii) such bands of frequencies meet the criteria required by section 113(a) of such Act [47 U.S.C.A. § 923(a)]; and

(iv) the Commission has completed the rulemaking required by section 332(c)(1)(D) of this title.

(B) Subsequent conditions

The Commission's authority to issue licenses or permits under this subsection on and after 2 years after August 10, 1993, shall cease to be effective if—

(i) the Secretary of Commerce has failed to submit the report required by section 113(a) of the National Telecommunications and Infor-

mation Administration Organization Act [47 U.S.C.A. § 923(a)];

(ii) the President has failed to withdraw and limit assignments of frequencies as required by paragraphs (1) and (2) of section 114(a) of such Act [47 U.S.C.A. § 924(a)];

(iii) the Commission has failed to issue the regulations required to section 115(a) of such Act [47 U.S.C.A. § 925(a)];

(iv) the Commission has failed to complete and submit to Congress, not later than 18 months after August 10, 1993, a study of current and future spectrum needs of State and local government public safety agencies through the year 2010, and a specific plan to ensure that adequate frequencies are made available to public safety licensees; or

(v) the Commission has failed under section 332(c)(3) of this title to grant or deny within the time required by such section any petition that a State has filed within 90 days after August 10, 1993;

until such failure has been corrected.

(11) Termination

The authority of the Commission to grant a license or permit under this subsection shall expire September 30, 1998.

(12) Evaluation

Not later than September 30, 1997, the Commission shall conduct a public inquiry and submit to the Congress a report—

(A) containing a statement of the revenues obtained, and a projection of the future revenues, from the use of competitive bidding systems under this subsection;

(B) describing the methodologies established by the Commission pursuant to paragraph (3) and (4);

(C) comparing the relative advantages and disadvantages of such methodologies in terms of attaining the objective described in such paragraphs;

(D) evaluating whether and to what extent—

(i) competitive bidding significantly improved the efficiency and effectiveness of the process for granting radio spectrum licenses;

(ii) competitive bidding facilitated the introduction of new spectrum-based technologies and the entry of new companies into the telecommunications market;

(iii) competitive bidding methodologies have secured prompt delivery of service to rural areas and have adequately addressed the needs or rural spectrum users; and

(iv) small businessses, rural telephone companies, and businesses owned by members of minority groups and women were able to participate successfully in the competitive bidding process; and

(E) recommending any statutory changes that are needed to improve the competitive bidding process.

(13) Recovery of value of public spectrum in connection with pioneer preferences

(A) In general

Nothwithstanding paragraph (6)(G), the Commission shall not award licenses pursuant to a preferential treatment accorded by the Commission to persons who make significant contributions to the development of a new telecommunications service or

technology, except in accordance with the requirements of this paragraph.

(B) Recovery of value

The Commission shall recover for the public a portion of the value of the public spectrum resource made available to such person by requiring such person, as a condition for receipt of the license, to agree to pay a sum determined by—

(i) identifying the winning bids for the licenses that the Commission determines are most reasonably comparable in terms of bandwidth, scope of service area, usage restrictions, and other technical characteristics to the license awarded to such person, and excluding licenses that the Commission determines are subject to bidding anomalies due to the award of preferential treatment;

(ii) dividing each such winning bid by the population of its service area (hereinafter referred to as the per capita bid amount);

(iii) computing the average of the per capita bid amounts for the licenses identified under clause (i);

(iv) reducing such average amount by 15 percent; and

(v) multiplying the amount determined under clause (iv) by the population of the service area of the license obtained by such person.

(C) Installments permitted.

The Commission shall require such person to pay the sum required by subparagraph (B) in a lump sum or in guaranteed installment payments, with or without royalty payments, over a period of not more than 5 years.

(D) Rulemaking on pioneer preferences

Except with respect to pending applications described in clause (iv) of this subparagraph, the Commission shall prescribe regulations specifying the procedures and criteria by which the Commission will evaluate applications for preferential treatment in its licensing processes (by precluding the filing of mutually exclusive applications) for persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service. Such regulations shall—

(i) specify the procedures and criteria by which the significance of such contributions will be determined, after an opportunity for review and vertification by experts in the radio sciences drawn from among persons who are not employees of the Commission or by any applicant for such preferential treatment;

(ii) include such other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of any such contribution justifies any reduction in the amount paid for comparable licenses under this subsection;

(iii) be prescribed not later than 6 months after December 8, 1994;

(iv) not apply to applications that have been accepted for filing on or before September 1, 1994; and

(v) cease to be effective on the date of the expiration of the Commission's authority under subparagraph (F).

(E) Implementation with respect to pending applications.—In applying this paragraph to any broad-

band licenses in the personal communications service awarded pursuant to the preferential treatment accorded by the Federal Communications Commission in the Third Report and Order in General Docket 90-314 (FCC 93-550, released February 3, 1994)—

(i) the Commission shall not reconsider the award of preferences in such Third Report and Order, and the Commission shall not delay the grant of licenses based on such awards more than 15 days following December 8, 1994, and the award of such preferences and licenses shall not be subject to administrative or judicial review;

(ii) the Commission shall not alter the bandwidth or service designated for such licenses in such Third Report and Order;

(iii) except as provided in clause (v), the Commission shall use, as the most reasonably comparable licenses for purposes of subparagraph (B)(i), the broadband licenses in the personal communications service for blocks A and B for the 20 largest markets (ranked by population) in which no applicant has obtained preferential treatment;

(iv) for purposes of subparagraph (C), the Commission shall permit guaranteed installment payments over a period of 5 years, subject to—

(I) the payment only of interest on unpaid balances during the first 2 years, commencing not later than 30 days after the award of the license (including any preferential treatment used in making such award) is final and no longer subject to administrative or judicial review, except that no such payment shall be required

prior to the date of completion of the auction of the comparable licenses described in clause (iii); and

(II) payment of the unpaid balance and interest thereon after the end of such 2 years in accordance with the regulations prescribed by the Commission; and

(v) the Commission shall recover with respect to broadband licenses in the personal communications service an amount under this paragraph that is equal to not less than $400,000,000, and if such amount is less than $400,000,000, the Commission shall recover an amount equal to $400,000,000 by allocating such amount among the holders of such licenses based on the population of the license areas held by each licensee.

The Commission shall not include in any amounts required to be collected under clause (v) the interest on unpaid balances required to be collected under clause (iv).

(F) Expiration

The authority of the Commission to provide prefential treatment in licensing procedures (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service shall expire on September 30, 1998.

(G) Effective date

This paragraph shall be effective on December 8, 1994 and apply to any licenses issued on or after August 1, 1994, by the Federal Communications

Commission pursuant to any licensing procedure that provides preferential treatment (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service.

* * * *

47 CFR ch. 1 (1995)

SUBPART C—RULEMAKING PROCEEDINGS

§ 1.402 Pioneer's preference.

(a) When filing a petition for rule making pursuant to § 1.401 that seeks an allocation of spectrum for a new service or that, by use of innovative technology in a new spectrum allocation, will substantially enhance an existing service, the petitioner may also submit a separate request that it be awarded a pioneer's preference in the licensing process for the service. Alternatively, if in an existing proceeding in which a notice of proposed rule making has not yet been adopted the Commission is addressing the new service or technology for which an applicant seeks a pioneer's preference, the applicant need not file a rule making petition but only a preference request. Each preference request must contain pertinent information concerning a description of the service to be provided, the applicant's plan for implementing the service, the frequencies it proposes to use, and the area for which the preference is sought, and must address any conflicting licensing rules, showing how these rules should or should not apply. The applicant must demonstrate that it (or its predecessor-in-interest) has developed the new service or technology; *e.g.*, that it (or its predecessor-in-interest) has developed the capabilities or possibilities of the technology or service or has brought them to a more advanced or effective state. The applicant must accompany its preference request with either a demonstration of the technical feasibility of the new service or technology or an experimental license application, unless an experimental license application has previously been filed for that new service or technology. If the applicant files or has filed an experimental license application, it must specify the area in which it intends to conduct its experiment and whether that is the area for which the preference is sought. In determining in its discretion whether to grant a pioneer's preference, the Commission will consider whether the ap-

plicant has demonstrated that it (or its predecessor-in-interest) has developed an innovative proposal that leads to the establishment of a service not currently provided or a substantial enhancement of an existing service. Additionally, the preference will be granted only if rules, as adopted, are a reasonable outgrowth of the proposal and lend themselves to the grant of a preference.

(b) Pioneer's preference requests relating to a specific new spectrum-based service or technology will not be accepted after the Commission's Sunshine Notice is issued announcing initiation, by either a notice of inquiry or notice of proposed rule making that will be considered by the Commission at a public meeting, of a proceeding pertaining to that service or technology. Alternatively, if the Commission initiates a new proceeding pertaining to a specific new spectrum-based service or technology by notation, pioneer's preference requests will not be accepted after such notice is submitted to the Commission for vote.

(c) Pioneer's preference requests complying with the requirements and procedures in paragraphs (a) and (b) of this section will be accepted for filing and listed by file number in a notice of proposed rule making addressing the new service or technology proposed in the request, if such a notice of proposed rulemaking is adopted. A final determination on a request for pioneer's preference and its scope will normally be made in a report and order adopting new rules for the service or technology proposed in the request, if such rules are adopted. If awarded, the pioneer's preference will provide that the preference applicant's application for a construction permit or license will not be subject to mutually exclusive applications. If granted, the construction permit or license will be subject to the conditions in paragraphs (e) and (f) of this section.

(d) Any interested person may file a statement in support of or in opposition to a request for pioneer's preference listed in a notice of proposed rule making,

and a reply to such statements, subject to filing deadlines that shall be published in the notice of proposed rule making. Statements on the merits of pioneer's preference requests must be filed separate from, and not part of, any comments on the rules proposed in the notice of proposed rule making. Statements on pioneer's preference requests will not be accepted prior to issuance of the notice of proposed rule making.

(e)As a condition of its license grant, a pioneer's preference grantee will be required to construct a system that substantially uses the design and technologies upon which its pioneer's preference award is based within a reasonable time, as determined by the Commission, after receiving its license. Failure to comply with this provision will result in revocation of the pioneer grantee's license, and transfer of the license will be prohibited until this requirement is met.

(f) In services in which licenses are assigned by competitive bidding, any parties receiving pioneer's preferences will be required to pay for their licenses in accord with the payment formula specified in the General Agreement on Tariffs and Trade legislation, Pub. L. 103-465. This formula requires that pioneers pay in a lump sum or in installment payments over a period of not more than five years 85 percent of the average price paid for comparable licenses. Comparable licenses will be determined by the Commission on a case-by-case basis. For licenses issued on or after August 1, 1994, the Commission shall recover for the public a portion of the value of the public spectrum resource made available to a pioneer's preference recipient by requiring such person, as a condition for receipt of the license, to agree to pay a sum determined by—

(1) Identifying the winning bids for the licenses that the Commission determines are most reasonably comparable in terms of bandwidth, scope of service area, usage restrictions, and other technical characteristics to the li-

cense awarded to such person, and excluding licenses that the Commission determines are subject to bidding anomalies due to the award of preferential treatment;

(2) Dividing each such winning bid by the population of its service area (hereinafter referred to as the per capita bid amount);

(3) Computing the average of the per capita bid amounts for the licenses identified under paragraph (f)(1) of this section;

(4) Reducing such average amount by 15 percent; and

(5) Multiplying the amount determined under paragraph (f)(4) of this section by the population of the service area of the license obtained by such person.

(g) In services in which licenses are awarded by competitive bidding, a pioneer that qualifies as a designated entity will be eligible for installment payments under the same terms and conditions as other designated entities in that service, except that in all services the pioneer's payments must be completed within a five year period that will begin 30 days after the auction for comparable licenses has concluded or 30 days after the pioneer's license grant becomes final, whichever is later. A pioneer, like other applicants, will be required in its license application to certify and make the requisite demonstration that it is eligible for installments. Pioneers that are not eligible for installment payments must make the 85 percent payment specified in § 1.402(f) within 30 days after the auction for comparable licenses has concluded or within 30 days after the license grant become final, whichever is later.

(h) An opportunity for review and verification of pioneer's preference requests by experts who are not Commission employees will be provided by the Commission. The Chief, Office of Engineering and Technology (OET)

may select a panel of experts consisting of persons who are knowledgeable about these specific technology set forth in a pioneer's preference request and who are neither employed by the Commission nor by any applicant seeking a pioneer's preference in the same or similar communications service. The panel of experts will generally be granted a period of up to 90 days, but no more than 180 days, to present their findings to the Commission. The Commission will generally establish, conduct, and seek the consensus of the panel pursuant to the Federal Advisory Committee Act, and will evaluate its recommendations in light of all the submissions and comments in the record. Panelists will have the authority to seek further information pertaining to preference requests and to perform field evaluations, as deemed appropriate by the Chief, OET.

(i) In order to qualify for a pioneer's preference in services in which licenses are awarded by competitive bidding, an applicant must demonstrate that the Commission's public rulemaking process inhibits it from capturing the economic rewards of its innovation unless it is granted a pioneer's preference license. The applicant must show that it may lose its intellectual property protection because of the Commission's public process; that the damage to its intellectual property is likely to be more significant than in other contexts, such as the patent process; and that the guarantee of a license is a significant factor in its ability to capture the rewards from its innovation. This demonstration will be required even if the Commission has not determined at the time a pioneer's preference request is filed whether assignments in the proposed service will be made by competitive bidding.

(j) In the event of a conflict between this rule and any rule for a particular service that provides for the filing and consideration of competing applications, this rule shall prevail.

(k) This section, along with the other pioneer's preference rules specified in §§ 0.241(f) and 5.207 of this chapter, will cease to be effective on September 30, 1998.

[57 FR 7882, Mar. 5, 1992, as amended at 59 FR 42528, Aug. 18, 1994; 60 FR 13636, Mar. 14, 1995; 60 FR 32119, June 20, 1995]

47 CFR Ch. 1 (1995)

§ 22.131 Procedures for mutually exclusive applications.

Two or more pending applications are mutually exclusive if the grant of one application would effectively preclude the grant of one or more of the others under Commission rules governing the Public Mobile Services involved. The Commission uses the general procedures in this section for processing mutually exclusive applications in the Public Mobile Services. Additional specific procedures are prescribed in the subparts of this part governing the individual Public Mobile Services (see §§ 22.509, 22.717, and 22.949) and in part 1 of this chapter.

(a) *Separate applicants.* Any applicant that files an application knowing that it will be mutually exclusive with one or more applications should not include in the mutually exclusive application a request for other channels or facilities that would not, by themselves, render the application mutually exclusive with those other applications. Instead, the request for such other channels or facilities should be filed in a separate application.

(b) *Filing groups.* Pending mutually exclusive applications are processed in filing groups. Mutually exclusive applications in a filing group are given concurrent consideration. The Commission may dismiss as defective (pursuant to § 22.128) any mutually exclusive application(s) whose filing date is outside of the date range for inclusion in the filing group. The types of filing groups used in day-to-day application processing are specified in

paragraph (c)(3) of this section. A filing group is one of the following types:

(1) *Renewal filing group.* A renewal filing group comprises a timely-filed application for renewal of an authorization and all timely-filed mutually exclusive competing applications (see § 22.145).

(2) *Same-day filing group.* A same-day filing group comprises all mutually exclusive applications whose filing date is the same day, which is normally the filing date of the first-filed application(s).

(3) *Thirty-day notice and cut-off filing group.* A 30-day notice and cut-off filing group comprises mutually exclusive applications whose filing date is no later than thirty (30) days after the date of the Public Notice listing the first-filed application(s) (according to the filing dates) as acceptable for filing.

(4) *Window filing group.* A window filing group comprises mutually exclusive applications whose filing date is within an announced filing window. An announced filing window is a period of time between and including two specific dates, which are the first and last dates on which applications (or amendments) for a particular purpose may be accepted for filing. In the case of a one-day window, the two dates are the same. The dates are made known to the public in advance.

(c) *Procedures.* Generally, the Commission may grant one application in a filing group of mutually exclusive applications and dismiss the other application(s) in the filing group that are excluded by that grant, pursuant to § 22.128.

(1) *Selection methods.* In selecting the application to grant, the Commission may use competitive bidding, random selection, or comparative hearings, depending upon the type of applications involved.

(2) *Dismissal of applications.* The Commission may dismiss any application in a filing group that is defective or otherwise subject to dismissal under § 22.128, either before or after employing selection procedures.

(3) *Type of filing group used.* Except as otherwise provided in this part, the type of filing group used in the processing of two or more mutually exclusive applications depends upon the purpose(s) of the applications.

(i) If one of the mutually exclusive applications is a timely-filed application for renewal of an authorization, a renewal filing group is used.

(ii) If any mutually exclusive application filed on the earliest filing date is an application for modification and none of the mutually exclusive applications is a timely-filed application for renewal, a same-day filing group is used.

(iii) If all of the mutually exclusive applications filed on the earliest filing date are applications for initial authorization, a 30-day notice and cut-off filing group is used, except that, for Phase I unserved area applications in the Cellular Radiotelephone Service, a one-day window filing group is used (see § 22.949).

(4) *Disposition.* If there is only one application in any type of filing group, the Commission may grant that application and dismiss without prejudice any mutually exclusive applications not in the filing group. If there is more than one mutually exclusive application in a filing group, the Commission disposes of these applications as follows:

(i) *Applications in a renewal filing group.* All mutually exclusive applications in a renewal filing group are designated for comparative consideration in a hearing.

(ii) *Applications in a 30-day notice and cut-off filing group.*

(A) If all of the mutually exclusive applications in a 30-day notice and cut-off filing group are applications for

initial authorization, and none is an application for facilities in the Rural Radiotelephone Service, the Commission shall administer competitive bidding procedures in accordance with subpart Q of part 1 of this chapter. After such procedures, the application of the successful bidder may be granted and the other applications may be dismissed without prejudice.

(B) If any of the mutually exclusive applications in a 30-day notice and cut-off filing group is an application for modification or an application for facilities in the Rural Radiotelephone Service, the Commission may attempt to resolve the mutual exclusivity by facilitating a settlement between the applicants. If a settlement is not reached within a reasonable time, the Commission may designate all applications in the filing group for comparative consideration in a hearing. In this event, the result of the hearing disposes of all the applications in the filing group.

(iii) *Applications in a same-day filing group.* If there are two or more mutually exclusive applications in a same-day filing group, the Commission may attempt to resolve the mutual exclusivity by facilitating a settlement between the applicants. If a settlement is not reached within a reasonable time, the Commission may designate all applications in the filing group for comparative consideration in a hearing. In this event, the result of the hearing disposes of all of the applications in the filing group.

(iv) *Applications in a window filing group.* Applications in a window filing group are processed in accordance with the procedures for a 30-day notice and cut-off filing group in paragraph (c)(4)(ii) of this section.

(d) *Terminology.* For the purposes of this section, terms have the following meanings:

(1) The *filing date* of an application is the date on which that application was received in a condition acceptable for filing or the date on which the most recently filed

major amendment to that application was received, whichever is later, excluding major amendments in the following circumstances:

(i) The major amendment reflects only a change in ownership or control found by the Commission to be in the public interest;

(ii) The major amendment as received is defective or otherwise found unacceptable for filing; or

(iii) The application being amended has been designated for hearing and the Commission or the presiding officer accepts the major amendment.

(2) An *application for initial authorization* is:

(i) Any application requesting an authorization for a new system or station;

(ii) Any application requesting authorization for an existing station to operate on an additional channel, unless the additional channel is for paired two-way radiotelephone operation, is in the same frequency range as the existing channel(s), and will be operationally integrated with the existing channel(s) such as by trunking;

(iii) Any application requesting authorization for a new transmitter at a location more than 2 kilometers (1.2 miles) from any existing transmitters of the applicant licensee on the requested channel or channel block; or

(iv) Any application to expand the CGSA of a cellular system (as defined in § 22.911), except during the five-year build-out period.

(3) An *application for modification* is any application other than an application for initial authorization or renewal.

[59 FR 59954, Nov. 21, 1994]

(2)

Supreme Court, U.S.
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No. 95-2048

In the Supreme Court of the United States

OCTOBER TERM, 1995

MOBILE TELECOMMUNICATION TECHNOLOGIES CORP.; DESTINEER CORPORATION, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission has the authority to impose a charge for a radio license that was based on auction prices paid for similar licenses, where the Commission determines that to issue the license free of charge would harm the public interest and might interfere with the auction of the similar licenses.

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FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 77 F.3d 1399. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 29a-71a) is reported at 9 FCC Rcd 3635.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1996. The court of appeals stayed its mandate for 30 days on May 22, 1996 (Pet. App. 74a), and the petition for a writ of certiorari was filed on June 20, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Communications Commission (FCC or Commission) may issue licenses for use of the electromagnetic spectrum only where doing so will serve "the public interest, convenience, and necessity." 47 U.S.C. 309(a); see also 47 U.S.C. 307(a). Until 1982, mutually exclusive applications for licenses—*i.e.*, competing requests to use a single set of frequencies—were resolved through a time-consuming and expensive "comparative hearing" process. In 1982, Congress authorized the Commission to resolve mutually exclusive applications through the use of random selection, or lottery. Communications Amendments Act of 1982, Pub. L. No. 97-259, § 115, 96 Stat. 1094 (codified at 47 U.S.C. 309(i)). Shortly thereafter, the Commission began to hold lotteries to award various types of licenses. The lottery method became the favored procedure for licensing wireless mobile telecommunications services such as cellular telephony and paging.

Neither lotteries nor comparative hearings provided any assurance that the inventor of a new technology or service would receive a license to implement its own invention. Moreover, even where an innovator ultimately succeeded in winning a license, the delay built into these procedures often deprived the public of early enjoyment of new developments. Over time, therefore, the Commission became concerned that these methods for awarding licenses might actually discourage innovation in communications services. The Commission thus adopted a "pioneer's preference" program, under which a qualified license applicant that had "developed the capabilities or possibilities of the technology or service or ha[d]

brought them to a more advanced or effective state," 47 C.F.R. 1.402(a), could receive a license without facing competing applications and without participating in a comparative hearing or lottery. See *In re Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services*, 6 FCC Rcd 3488, 3492 (1991), recon., 7 FCC Rcd 1808 (1992), further recon., 8 FCC Rcd 1659 (1993).

2. In November 1991, petitioner Mobile Telecommunication Technologies Corp.[1] applied for a pioneer's preference to provide narrowband personal communications services (narrowband PCS), a type of paging or "beeper" service resembling, but far more advanced than, currently available paging service. After notice and comment, the Commission granted petitioner's request for a narrowband PCS preference, *In re Amendment of the Commission's Rules to Establish New Personal Communications Services, First Report and Order*, 8 FCC Rcd 7162 (1993), and invited petitioner to apply for a license, FCC Public Notice, No. 41645, Commission Invites Filing of Narrowband Personal Communications Service Pioneer's Preference Application (Feb. 3, 1994). Petitioner filed its application for a license in

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[1] Petitioner Mobile Telecommunication Technologies Corp. (Mtel), the original recipient of the pioneer's preference at issue, asked the FCC to issue the license granted pursuant to that preference to Nationwide Wireless Network Corp. (NWN Corp.), which was Mtel's wholly owned subsidiary. See Pet. 1 n.1; Pet. App. 29a-30a n.1. NWN Corp. has been renamed "Destineer Corporation," which appears with Mtel as a petitioner in this case. See Pet. 1 n.1. For ease of exposition, we refer to Mtel and Destineer Corporation collectively as "petitioner."

February 1994. The Commission granted no other narrowband PCS preferences.

In August 1993, after the Commission had awarded petitioner a pioneer's preference but before it had issued a license, Congress authorized the Commission to use a "competitive bidding" method (*i.e.*, an auction) to award certain radio licenses, including narrowband PCS licenses. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 388 (codified at 47 U.S.C. 309(j)). The auction statute did not, however, authorize the Commission to apply its bidding procedures to applicants who had won pioneer's preferences. Auctions were limited to mutually exclusive applications, and the applications of preference winners were not subject to competing applications. Congress made clear, moreover, that its provision of an auction option did not require the Commission to eliminate the pioneer's preference program. See 47 U.S.C. 309(j)(6)(G).

The Commission undertook a rulemaking proceeding to determine the effect of its new auction authority on the pioneer's preference program. See *In re Review of the Pioneer's Preference Rules, Notice of Proposed Rulemaking*, 8 FCC Rcd 7692, 7692-7693 (1993). The Commission initially stated that its review of pioneer's preference rules would not affect the narrowband PCS proceedings in which petitioner had already been granted a preference. *Id.* at 7694-7695; accord *In re Amendment of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order*, 9 FCC Rcd 1309, 1315-1316 (1994). On further consideration, however, the Commission determined that it would harm the public interest to grant any PCS pioneer, including petitioner, a free license. In a

determination that petitioner does not challenge in this Court, the Commission reasoned that giving one narrowband PCS provider a free license, while requiring its competitors to pay millions of dollars at auctions for their licenses, could seriously distort both the market and the auction itself. Pet. App. 42a-50a.

Having found that the public interest required petitioner to pay for its license, Pet. App. 48a, the Commission considered whether it has the authority to require such a payment and determined that it does. *Id.* at 50a-59a. The Commission based that determination principally on Section 4(i) of the Communications Act of 1934, 47 U.S.C. 154(i), in conjunction with Sections 303(r), 307 and 309. 47 U.S.C. 303(r), 307, 309. Section 4(i) authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions."

The Commission determined that requiring payment is "necessary in the execution of its functions" under several statutory commands. First, having already found that granting a free license would harm the public interest, the Commission determined that issuing such a license would violate the public interest requirements of Sections 307(a) and 309(a). Pet. App. 57a n.104; see also 47 U.S.C. 303(r) (Commission may impose necessary conditions on radio licenses). Second, Section 309(j) requires the Commission to "design and conduct a rational and fair auction for narrowband PCS licenses," Pet. App. 57a, and giving petitioner a free license would violate that command "because such a grant would create a competitive imbalance in PCS markets and because

granting a free license regardless of its value would alter the competitive market and distort the statutory auction process." *Id.* at 57a-58a. Finally, giving petitioner a free license would unjustly enrich it in violation of 47 U.S.C. 309(j)(3)(C). Pet. App. 70a (separate statement of Commissioner Ness); see also *In re Review of the Pioneer's Preference Rules, Memorandum Opinion and Order on Remand*, 9 FCC Rcd 4055, 4059 (1994) (applying same reasoning to require "broadband" PCS pioneers to pay for their licenses).

The Commission thus required petitioner to pay for its license, albeit at a significantly lower price than that ultimately paid by the auction participants.[2] Petitioner then filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

3. The court of appeals denied petitioner's petition for review in part and granted it in part. Pet. App. 1a-28a. First, the court upheld the Commission's determination that it had the authority to require payment from petitioner. It rejected petitioner's argument that by specifying two methods by which the Commission could charge for a license—an application fee

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[2] The Commission fixed the cost at the lower of 90% of or $3 million less than the lowest winning bid. Pet. App. 49a. The auction ultimately produced a lowest winning bid of $37 million, 90% of which is approximately $33 million. The highest winning bid was $80 million, and the average of the ten winning bids was about $62 million. In addition to its pioneer's preference license, petitioner bid on and won two other narrowband PCS licenses, one for $80 million and one for $47.5 million. See FCC Public Notice, Announcing the High Bidders in the Auction of Ten Nationwide Narrowband PCS Licenses, at 1 (Aug. 2, 1994).

under 47 U.S.C. 158(g)[3] or an auction under 47 U.S.C. 309(j)—Congress had necessarily prohibited the Commission from assessing charges in any other way. The court observed that "the expressio unius maxim—that the expression of one is the exclusion of others— * * * has little force in the administrative setting," and that, in any event, "the nature of Congress's [1993] auction authorization more supports than undermines the Commission's decision here." Pet. App. 7a. Specifically, by "sharply widen[ing] the *incremental* benefit accruing to a preference, vis-a-vis other would be license holders," the 1993 legislation had given rise to the Commission's authority to "reduce th[at] gulf" as part of its more general mandate to protect the public interest, convenience and necessity. *Id.* at 9a; see also *id.* at 11a.

Having concluded that the Commission had the authority to charge petitioner for the license, the court nevertheless remanded the Commission's decision to exercise that authority on the facts of this case. The court held that the Commission had not given petitioner an adequate opportunity to argue that its asserted reliance interest in obtaining a free license should affect the Commission's public interest determination. The court also held that the Commission had not addressed petitioner's argument that others were obtaining similar licenses for paging systems without having to pay for them. Accordingly, the court remanded the case for the Commission to consider those issues. Pet. App. 12a-13a.[4]

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[3] The statutory application fee for petitioner's license was $230. See Pet. 4-5.

[4] The court of appeals rejected a separate challenge, brought by a competing preference applicant, to the Commis-

Chief Judge Edwards dissented. He concluded, among other things, that neither the 1993 auction legislation nor the FCC's general grant of authority under Section 4(i) justified charging for a license that was not subject to auction under the 1993 statute. Pet. App. 25a-27a.

ARGUMENT

1. As an initial matter, the petition should be denied because, given the procedural posture of this case, this Court's review would be premature. Petitioner challenges the court of appeals' holding that the Commission had authority to charge petitioner for its license. The court also held, however, that the Commission had not adequately justified its exercise of that authority, and it remanded the matter to the agency for further consideration of petitioner's asserted reliance interests and its claim of inconsistent treatment. On remand, the Commission may, among its several options, choose not to impose any charge at all, a decision that would end any controversy between the parties. Thus, "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); accord *Virginia Military Institute* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari) (citing cases); Robert L. Stern and

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sion's award of a preference and a license to petitioner. See Pet. App. 14a-20a. No party has sought review of that aspect of the court's decision.

Eugene Gressman, *Supreme Court Practice* § 4.18, at 196 (7th ed. 1993).[5]

2. Quite apart from that threshold concern, the petition should be denied because the issue presented is not of continuing importance. This dispute concerns a single license for which the Commission imposed a charge in circumstances that are unique to that license and will not recur. The decision to charge for the license was the product of the Commission's one-time attempt to reconcile its pioneer's preference program with a fundamental change in the licensing regime. Because Congress recently enacted a statute (the "GATT legislation") requiring the FCC to charge future pioneer's preference recipients for their licenses, see Uruguay Round Agreements Act, Pub. L. No. 103-465, § 801, 108 Stat. 4809 (codified at 47 U.S.C. 309(j)(13)), see also Pet. App. 10a n.1, the Commission's decision will have little or no effect on any other licensee.

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[5] In the order under review, the Commission noted that it will not collect any payment from petitioner until its orders "are no longer subject to administrative reconsideration or judicial review." Pet. App. 66a. Thus, petitioner will suffer no harm from a delay in further review of its claim, should such review become necessary. Moreover, if a live dispute between the parties persists after remand, petitioner will retain its right to present to this Court any claim that it has raised in this petition. See, *e.g.*, *Urie* v. *Thompson*, 337 U.S. 163, 172-173 (1949); Robert L. Stern and Eugene Gressman, *Supreme Court Practice* § 4.18, at 198 (7th ed. 1993) ("[d]enial of certiorari at the interlocutory stage of a proceeding is without prejudice to renewal of the questions presented when certiorari is later sought from the final judgment, assuming the questions are properly preserved in the lower courts after the original denial").

Petitioner contends that the court of appeals has broadly granted the FCC "'the power to do whatever it pleases merely by virtue of its existence,'" Pet. 15 (quoting Pet. App. 26a (Edwards, C.J., dissenting in part)), and "the power to do anything that Congress has not explicitly prohibited [it] from doing," Pet. 18. But the court of appeals did no such thing. Instead, it determined that the Commission's general statutory authority to act in the public interest authorizes it, in the unique circumstances of this case, to deny petitioner the unfair windfall that an unqualified application of the Commission's own creation—the pioneer's preference program—would confer. At bottom, the court's holding is confined to a narrow rejection of the "untenable" argument at the heart of petitioner's position: that "[b]ecause the Commission *before* the 1993 amendment of the Communications Act had provided for an *exception* to what was then its only way of issuing licenses for which there was competition, Congress forbade it [in 1993] from *qualifying that exception*," Pet. App. 8a-9a, even though doing so would be entirely consistent with the revised statutory scheme and in furtherance of the public interest committed to the Commission's charge.

Similarly, petitioner argues (Pet. 14) that the court of appeals' holding will grant "sweeping new powers to other administrative agencies" that have "necessary and proper" clauses in their organic statutes. Again, nothing in the decision below supports that view. In any event, the proper occasion to address petitioner's hypotheticals (see Pet. 15-17) concerning imaginary administrative abuses—perpetrated by other agencies under other statutory schemes—is if and when those hypotheticals ever become reality.

3. On the merits, petitioner's principal argument is that application fees and auction monies "are the only types of assessments the Commission is authorized to collect in connection with telecommunications licenses," Pet. 20, and that the license charge at issue here is therefore inconsistent with the Communications Act. In other words, petitioner relies, without saying so expressly, on the *expressio unius* rationale rejected by the court of appeals, and claims that "this rule applies with special force in the administrative context." Pet. 21.

As the court of appeals correctly observed, however, "[t]he [*expressio unius*] maxim has little force in the administrative setting," in which courts should "defer to an agency's interpretation of a statute unless Congress has directly spoken to the precise question at issue." Pet. App. 7a (internal quotation marks omitted) (citing *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842 (1984)). This Court too has rejected efforts to use a similar rationale to impair the FCC's general statutory authority to effectuate the purposes of the Communications Act. In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), citing the Commission's "comprehensive mandate" and "expansive powers" to fulfill that mandate, *id.* at 173, this Court declined to "limit[] the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions." *Id.* at 172; see also *Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968) ("We are, in the absence of compelling evidence that such was Congress' intention, unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes."). Indeed, "underlying the whole Communications Act is recognition of the

rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *Southwestern Cable Co.*, 392 U.S. at 172-173 (internal brackets and quotation marks omitted).

In other cases as well, courts have upheld the Commission's exercise of general statutory authority to regulate in the public interest even in the absence of a specific statute narrowly authorizing such regulation: *e.g.*, prescribing rates of return where the statute expressly authorized only the prescription of actual rates, see *Nader* v. *FCC*, 520 F.2d 182, 204 (D.C. Cir. 1975); requiring a "connecting" telephone company to file a tariff even though the tariff statute exempted connecting carriers, see *Lincoln Telephone & Telegraph Co.* v. *FCC*, 659 F.2d 1092 (D.C. Cir. 1981); ordering payment of refunds to customers as a means of enforcing a prescribed rate of return, see *New England Telephone & Telegraph Co.* v. *FCC*, 826 F.2d 1101 (D.C. Cir. 1987); promulgating newspaper-broadcasting cross-ownership restrictions, see *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978); and imposing equal employment opportunity standards on broadcast licensees, see *Office of Communications of the United Church of Christ* v. *FCC*, 560 F.2d 529 (2d Cir. 1977). In each instance, the Commission determined, and the reviewing court agreed, that regulation not specifically provided for by statute was "necessary" to fulfill statutory objectives.[6]

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[6] In an argument addressed by neither the majority nor the dissent below, petitioner suggests (Pet. 19-20) that the nondelegation doctrine requires courts to adopt a narrow con-

That is precisely what happened here. When Congress revolutionized the methods by which the Commission may award licenses by adding an auction option, the Commission needed to adapt preexisting programs, such as pioneer's preferences, to the new regime. The Commission determined that granting free licenses to pioneers when others would have to pay millions of dollars at auctions for similar licenses could interfere with both the narrowband PCS auction and the wireless communications market itself—contrary to the Commission's statutory obligations to issue licenses only insofar as they serve the public interest, 47 U.S.C. 309(a), 307(a), 214, and to "make available * * * a[n] * * * efficient * * * radio communication service." 47 U.S.C. 151. Moreover, granting free licenses in these circumstances would contravene the Commission's addi-

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struction of any congressional delegation of authority to collect fees. Even if this case involved delegation of Congress's constitutional authority to raise revenue, this Court has unanimously held that such delegation "is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges." *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 223 (1989). The *Skinner* Court added that *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974), upon which petitioner principally relies for its contrary view (see Pet. 19), "stand[s] *only* for the proposition that Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs *not inuring directly to the benefit of regulated parties* by imposing additional financial burdens * * * on those parties." 490 U.S. at 224 (emphasis added); see also *United States* v. *Sperry Corp.*, 493 U.S. 52, 60-61 (1989) (discussing similar issues under Takings Clause). That concern is inapplicable here, for the Commission has charged petitioner only for the value—indeed, *less* than the fair market value, see note 2, *supra*—of petitioner's own license.

tional statutory obligation to ensure that auctions not result in unjust enrichment. 47 U.S.C. 309(j)(3)(C). The court of appeals correctly deferred to "the Commission's judgment regarding how the public interest is best served," Pet. App. 11a (quoting *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 596 (1981)), a judgment that petitioner does not challenge in this Court.[7]

In sum, the court of appeals' holding simply affirms the Commission's general statutory authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Communications Act], as may be necessary in the execution of its functions," 47 U.S.C. 154(i), and to "prescribe such * * * conditions, not inconsistent with law, as may be necessary to carry out the provisions of" the Act, 47 U.S.C. 303(r). Accepting petitioner's assertion that the Commission may act only where Congress has narrowly and specifically authorized it to do so would read those provisions out of the Communications Act.[8]

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[7] Petitioner suggests (Pet. 22-23) that the court of appeals improperly based its decision to uphold the license charge on an inference that the auction statute embodies a general congressional intent to use the licensing process to raise money. However, the court of appeals adopted no such reasoning, and neither did the Commission. The court held only that the Commission was entitled to "reduce the gulf between recipients of preferences and other license applicants," Pet. App. 9a, so long as the result would be—as here—entirely consistent with the statutory scheme that Congress created in its 1993 legislation. See *ibid.*

[8] In a similar vein, petitioner argues (Pet. 20-21) that Congress's enactment of the GATT legislation, which required broadband PCS pioneers to pay substantial sums for their licenses but does not apply to petitioner's far less costly

CONCLUSION

The petition for a writ of certiorari should be denied.

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narrowband PCS license, forecloses Commission discretion to charge petitioner for that license. That claim is without merit. As the court of appeals held, "Congress was silent about the treatment of narrowband license recipients" in the GATT legislation. Pet. App. 10a n.1. Thus, to the extent that Congress intended to treat the two groups of pioneers differently, "the Commission's decision—that it was authorized but not directed to charge—would nevertheless be consistent with the amendment." *Ibid.* Petitioner's argument boils down to another application of the *expressio unius* maxim, which is no more persuasive with respect to the GATT legislation than with respect to the Communications Act.

(3)

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IN THE

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OCTOBER TERM, 1995

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DESTINEER CORPORATION,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

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On Petition for Writ of Certiorari to the
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REPLY TO BRIEF IN OPPOSITION

I. THE COURT SHOULD REVIEW THIS CASE NOW.

Despite the court of appeals' remand for the Federal Communications Commission to exercise the challenged authority to charge the winner of a pioneer's preference a multi-million dollar license fee, this case should be reviewed now. First, the issue on which *certiorari* is sought is purely legal — *i.e.*, whether the agency has the power to impose an enormous and unprecedented charge based on its so-called "necessary and proper" authority where such a charge is inconsistent with other provisions of the Act. *See, e.g., Gillespie v. United*

States Steel Corp., 379 U.S. 148, 153-54 (1964) (granting interlocutory appeal where legal issue was "fundamental to the further conduct of the case"); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (same).

Second, the case is clearly "ripe" on a technical level: the issue is fit for review and further delay will only cause hardship to the parties. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). The issue here is purely legal, the agency's position is clear, and delay will not further illuminate the issue or in any way benefit this Court. *See Mountain States Telephone and Telegraph Co. v. FCC*, 939 F.2d 1021, 1028 (D.C. Cir. 1991). Rather, delay would only harm Mtel and waste administrative resources. Indeed, Mtel could be forced to litigate for years on the assumption that the agency has authority that Mtel firmly believes this Court will find that the agency lacks. Thus, the Court should grant the petition for writ of *certiorari* now.

II. IN REFUSING TO EMPLOY "TRADITIONAL TOOLS OF INTERPRETATION" TO ASCERTAIN CONGRESS'S INTENT ON THE ISSUE HERE, THE OPINION BELOW FAILED TO FAITHFULLY APPLY THIS COURT'S PRECEDENT.

"Statutory construction . . . is a holistic endeavor." *United Savings Ass'n v. Timbers of Inwood Forest Ass'n Ltd.*, 484 U.S. 365, 371 (1988). Thus, in determining whether Congress has "had an intention on the precise question at issue," *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court examines the text and structure of the statute as a whole to determine if it is ambiguous. *See, e.g., Brown v. Gardner*, 115 S. Ct. 552, 555 (1994) ("Ambiguity is a creature not of definitional

possibilities but of statutory context . . . ."); *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 112 S. Ct. 1394, 1401 (1992) ("In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole."); *K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988). The *Chevron* inquiry assesses whether Congress has delegated to the agency the authority to decide the question at issue. *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 516.

Here, in affirming the Commission's unprecedented assertion of fee-charging authority, the lower court ignored substantive constraints that Congress has placed on the agency's power to collect monies. Pet. 4. In violation of *Chevron*, the lower court ignored the language and structure of the Communications Act and sixty years of agency practice in discovering sweeping FCC fee authority in the agency's "necessary and proper" clause. In reaching this result, the majority gave insufficient weight to two maxims of statutory interpretation that should have been applied in the first instance in assessing the meaning of the statute: that the specific controls the general, *see, e.g.*, *Holder v. Hall*, 114 S. Ct. 2581, 2604 (1994), and the *expressio unius* maxim. *See, e.g.*, *National R.R. Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.") (*quoting Botany Mills v. United States*, 278 U.S. 282, 289 (1929)). Instead, in interpreting congressional will, the majority below improperly relied on the statute's most general provisions, as well as the FCC's conception of the broad purposes underlying the statute.

A. In Misconstruing the Act, the Lower Court Disregarded Both the *Expressio Unius* Maxim, As Well As the Principle that the Specific Controls the General.

When assessing whether the text is or is not ambiguous, the Court draws on a wide array of "traditional tools;" *Chevron* step 1 is not limited to analysis of the specific terms at issue.[1] Rather, the Court considers the language, structure, and design of the statute as a whole. *See, e.g., NLRB v. United Food & Commercial Workers Union Local 23*, 484 U.S. 112, 124-25 (1987) ("The words, structure, and history of the LMRA amendments to the NLRA clearly reveal" Congress's intent; from such sources, the Court found that "the general congressional framework . . . is easy to discern."); *see also, id.* at 128 (referring to "the structure of the Act"). Congress's intent may also be discerned on the basis of other provisions of the statute. *Central Bank v. First Interstate Bank*, 511 U.S. 164, 114 S. Ct. 1439, 1447-48 (1994). If the text, history, and structure of the statute indicate, as is the case here, that the agency lacks the authority it asserts, then the agency's action will be invalidated, even if there is no phrase that directly addresses the exact question at issue.

In undertaking this analysis, the presumption that the delegation of a carefully limited power implies the negation of closely related power is especially important. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993); *Brown v.*

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[1] *Chevron* asks, first, "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If it has not, and the statute is ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Gardner, 115 S. Ct. 552, 556 (1994) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."). Although some have criticized the presumption, its utility remains clear:

> The purpose of this maxim — and its utility — is to emphasize that statutes should not be casually construed to mandate changes not specified by the language chosen. Second, the maxim is so much a part of the interpretive process that it often need not be cited, or even thought about, because the correctness of the interpretation will not be questioned.

David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 928 (1992). Similarly, the principle that the specific controls the general ensures that particular issues on which Congress has forged and expressed a consensus are not overridden by judicial interpretation of looser language that may embody sentiments, as opposed to hard decisions, about defined questions.[2]

Congress has given the Commission certain powers and denied it closely related powers. As noted in Mtel's Petition,

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[2] Moreover, in the absence of a clear statement of Congress to the contrary, statutory interpretation should protect reasonable, settled expectations. *See, e.g.*, Stephen G. Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 So. Cal. L. Rev. 847, 856 (1991). Here, as even the majority below agreed, Mtel's reasonable "settled expectation" was that it would not have to pay a multi-million dollar license fee. Pet. App. 12a-14a. In addition, the reasonable and settled expectations of those who are not seeking mutually exclusive licenses is that they will not be subject to auction-level fees. 47 U.S.C. § 309(j)(1) (1994) (Pet. App. 86a).

Congress has authorized the FCC to collect monies only in a few, narrowly circumscribed situations. Pet. 4, 20-22. Most relevant here are two: (1) the agency may collect license fees set by Congress that may be increased only in the specific manner prescribed by Congress, 47 U.S.C. §§ 158, 159 (1994) (Pet. App. 75a-85a); and (2) the agency may auction off mutually exclusive licenses 47 U.S.C. §§ 309(j)(1) (Pet. App. 86a). Yet Mtel's charge was not set based on the agency's licensing fee authority, nor did Mtel seek or receive a mutually exclusive license. These two express limitations on the agency's authority to charge monies necessarily limit the more general grant of authority to regulate the electromagnetic spectrum to serve the "public interest, convenience, and necessity," which the agency relied on to impose this charge.

The lower court flatly rejected Mtel's argument as relying too much on the *expressio unius* maxim which, it said, had "little force in the administrative setting." Pet. App. 7a. But, as Chief Judge Edwards' dissent demonstrates, Mtel's criticism of the agency's interpretation cannot be so easily deflected. As in *Railway Labor Executives' Ass'n v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994)(en banc), *cert. denied*, 115 S. Ct. 1392 (1995), Mtel's conclusion that the agency "lacked authority for its action followed a careful exegesis of the entire statutory context, the statute's legislative history, and the agency's unvarying practice over a 60-year history." Pet. App. 9a. The *expressio unius* maxim, like the principle that specific provisions control the interpretation of more general ones, were part of Mtel's "careful exegesis" revealing the agency's lack of authority to impose an unprecedented multi-million charge.

In asserting that these maxims supply useful presumptions, Mtel is not suggesting that the Commission's power is or should be limited to "those activities and forms of communication that are specifically described by the Act's other provisions." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172 (1968). But surely an assessment of whether an agency is empowered to undertake an entirely unprecedented action requires more than a quick survey of the statute to ensure that Congress has not expressly prohibited the proposed action.[3] The Commission's "public interest" authority is indeed broad, but it has not previously been thought to give the FCC, in the words of Chief Judge Edwards, "the power to do whatever it pleases merely by virtue of its existence." Pet. App. 26a. Given that the D.C. Circuit's docket disproportionately involves review of actions by the many agencies having broad grants of authority coupled with so-called "necessary and proper clauses," the Court should review the decision below to clarify that agencies do not have the inherent power to undertake any endeavor unless it has been expressly prohibited by Congress.[4]

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[3] *Cf.* Scalia, *Judicial Deference*, 1989 Duke L.J. at 521 (the more often one finds "that the meaning of a statute is apparent from its text and its relationship with other laws," the less often will one find "that the triggering requirement for *Chevron* deference exists").

[4] Congress's failure to enact H.R. 4700 — which would have required Mtel to pay an auction-based fee — confirms the lack of agency authority to undertake this change. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 114 S. Ct. 517, 526-27 (1993). Moreover, when Congress intended pioneer's preference holders to pay, it had little trouble doing so expressly through the GATT legislation (47 U.S.C. §309(j)(13)(B)). *See Central Bank*, 114 S. Ct. at 1448 (declining to extend the statute to include "aiding and abetting liability" in part because "Congress knew how to impose aiding and

B. Congress's Specific Statutory Directions Cannot Be Overridden By Reference to Some Broad Purpose.

The majority opinion defended its interpretation of the Commission's authority as true to the broad purposes of the auction provisions, one of which was to raise revenue. But, as this Court explained in *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986):

> Application of the "broad purposes" of the legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Yet that is exactly the mistake that the majority opinion makes. Seeking to effectuate "the benefits of Congress's own new policy — including obtaining reimbursement for the transfer of a valuable entitlement," Pet. App. 9a, the lower court subjected Mtel to an auction-level fee. It did so despite its concession, which is reiterated by the FCC in its Opposition, that "the statute did not . . . authorize the Commission to apply its bidding procedures to applicants who had won pioneer's preferences." Opp. 4; *see also* Pet. App. 8a.

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abetting liability when it chose to do so").

And, it must be recalled, that Congress, in the very same statute, ackowledged the pioneer's preference program by expressly permitting the FCC to continue awarding such preferences. 47 U.S.C. § 309(j)(6)(G) (1994) (Pet. App. 90a). The court of appeals therefore erred in finding that Congress had implicitly empowered the FCC to charge the same types of fees to pioneers that it explicitly authorized the agency to charge those who had been awarded mutually exclusive licenses (which, it will be recalled, pioneer's preference are not (47 C.F.R. § 1.402(c) (1994) (Pet. App. 101a)).

In the absence of a clear statement by Congress to the contrary, fundamental policy decisions are to be made by Congress, not by an administrative agency. *See, e.g., United States v. Taylor*, 487 U.S. 326 (1988) (Scalia, J., concurring). Whether an agency may charge licensees multi-million dollar fees is plainly a fundamental policy decision. Congress has paid careful attention to the issue of license fees through the years, and has narrowly confined the agency's authority to administer such charges. Yet the Commission has decided that because it has determined that such a fee is in the public interest, and it has the authority to do that which is "necessary and proper," it can arrogate to itself the authority to make this decision. *See* Pet. App. 26a (Edwards, C.J., dissenting in part). This was clear error. The Court should grant the petition for writ of *certiorari*, and reverse the decision below.[5]

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[5] The FCC contends that Mtel has not challenged in the Supreme Court the Commission's reasoning that giving one narrowband PCS provider a free license "could seriously distort both the market and the auction itself." Opp. 4-5. Mtel strongly contested the validity of this contention before the D.C. Circuit. *See, e.g.*, Brief of Appellant Mtel, No. 94-1552 at 24-26, 31-33 (D.C. Cir.) (filed Nov. 8, 1995). Because the D.C. Circuit agreed with Mtel that the agency's decision was arbitrary

CONCLUSION

For the reasons set forth herein and in Mtel's petition for writ of *certiorari*, the Court should vacate the opinion below and set the case for plenary review.

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and capricious, Mtel need not press that point with this Court. Rather, this challenge focuses exclusively on the scope of the FCC's authority granted by Congress.